Supreme Court, U.S.
F I L E D

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No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1998

Rick Clark,

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether federal judges may extend criminal jurisdiction under Title 18 U.S.C. § 241 to tribal elections, absent any express congressional authority for federal prosecution of tribal election fraud, and contrary to both the legislative history of the Indian Civil Rights Act, Title 25 U.S.C. § 1302, and this Court's unwavering commitment to preserving inherent tribal sovereignty by recognizing the exclusive right of tribes to decide cases involving purely tribal matters or issues of tribal self-government.

II. When does federal criminal jurisdiction exist to prosecute an Indian for committing a crime against another Indian in Indian country?

LIST OF OTHER PARTIES TO THE PROCEEDING

Darrell Chip Wadena, Defendant
Jerry Joseph Rawley, Defendant

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PETITION FOR WRIT OF CERTIORARI

Rick Clark respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 11, 1998, because the Eighth Circuit decided an important question of federal law that has not been, but should be, settled by the Supreme Court, and also entered a decision in direct conflict with the decisions of other United States Courts of Appeals on the same important matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit that gives rise to this petition is published at 152 F.3d 831 (8th Cir. 1998), and is also set forth at pages A-54 to A-107 of the Appendix. By order filed August 27, 1998, the Eighth Circuit denied Mr. Clark's petition for rehearing. App. A-108.

JURISDICTION

In June 1996, Rick Clark was convicted of various crimes in the United States District Court for the District of Minnesota. Mr. Clark filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit which affirmed his convictions but remanded for resentencing in an opinion filed on August 11, 1998. In an order filed on August 27, 1998, the Eighth Circuit denied Mr. Clark's timely-filed petition for rehearing, as well as his codefendants' timely-filed petitions for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of denial of the petitions for rehearing.

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254.

STATUTES INVOLVED IN THIS CASE

The following relevant statutes are set forth in the Appendix:

Title 18 U.S.C. § 241
Title 18 U.S.C. § 1152
Title 18 U.S.C. § 1153
Title 25 U.S.C. § 1302

STATEMENT OF THE CASE

In August 1995, Rick Clark and five others were indicted by a grand jury in a 39-page, 44-count indictment. App. A-113. In June 1996, a jury convicted Mr. Clark of conspiracy, in violation of Title 18 U.S.C. § 371, theft or bribery concerning programs receiving federal funds, in violation of Title 18 U.S.C. § 666, money laundering, in violation of Title 18 U.S.C. § 1957, willful misapplication of tribal funds, in violation of Title 18 U.S.C. § 1163, mail fraud, in violation of Title 18 U.S.C. § 1341, and election fraud, in violation of Title 18 U.S.C. § 241. App. A-43. Mr. Clark was sentenced on November 26, 1996 to serve 46 months in prison. App. A-45. The Eighth Circuit Court of Appeals affirmed Mr. Clark's convictions but remanded for resentencing in United States v. Wadena, 152 F.3d 831 (8th Cir. 1998), and subsequently denied his petition for rehearing on August 27, 1998. App. A-108. Upon remand, Mr. Clark was resentenced to 21 months on October 15, 1998.

For purposes of this petition, Mr. Clark accepts the facts set forth in the court of appeals' opinion. Wadena, 152 F.3d at 836-39. Nevertheless, he challenges the lower courts' unprecedented extension of federal criminal jurisdiction to

tribal election fraud, and the exercise of jurisdiction in a case involving purely internal tribal matters and issues of self-government historically reserved for resolution exclusively in tribal forums. Three distinct conspiracies gave rise to the offenses for which Mr. Clark was prosecuted: (1) the construction conspiracy; (2) the commissions conspiracy; and (3) the election conspiracy. The overwhelming majority of the evidence presented during his lengthy and complex trial pertained only to the tribal election fraud conspiracy.

Mr. Clark, an Indian, was an elected member of the White Earth Reservation Tribal Council--an independent tribal government. The White Earth Band, of which he is a member, is one of six bands comprising the Minnesota Chippewa Tribe. The White Earth Reservation, where all the alleged crimes occurred, was established by the Treaty of 1867. Mr. Clark's codefendants, Wadena and Rawley, are also Indians who were elected members of the tribal council; Wadena was council chairman and Rawley was the secretary-treasurer. In addition to his duties as a tribal council member, Mr. Clark owned and operated Northern Drywall and Construction.

In 1991, the tribal council decided to construct a casino on the reservation and hired Indian-owned Gordon Construction as the general contractor. Harold Gordon, its owner and Mr. Clark's cousin, subcontracted the casino project's drywall and painting to Northern Drywall in accordance with the tribal council's Indian preference policy; Northern Drywall was the only Indian-owned business to bid on the contract. After being awarded the subcontract, Mr. Clark gave Wadena a one-half interest in Northern Drywall because of his contacts and construction experience, and also paid Rawley for consulting services. The government alleged that Mr. Clark obtained the casino project's drywall and painting subcontract by misusing his position as a tribal

council member, giving Wadena an interest in Northern Drywall and paying Rawley consulting fees.

In 1991, the tribal council also established a gaming commission, appointed themselves its members, and voted to increase their compensation based on the casino's success, their new duties involving the casino's administration, and their prior work in planning and building the casino. In 1993, the tribal council also established a fishing commission and appointed themselves its members in order to take advantage of a new federal tax exemption for income generated in relation to Indian fishing-treaty rights. The tribal council voted to exempt 50% of its members' salaries through the fishing commission; although salaries were not increased, half of them became tax exempt. Claiming that Mr. Clark and his codefendants were paid excessive salaries for their services as both tribal council and commission members, the government alleged that they misapplied tribal funds.

Finally, the government charged Mr. Clark and Rawley with conspiring to injure and oppress voters in a tribal election. Tribal council members are elected every two years and because most of White Earth's members do not live on the reservation, many vote by absentee ballot. Pursuant to tribal election laws, to do so a member must request an absentee ballot, complete it, place it in an absentee ballot envelope, sign the affidavit on the envelope, have the signature notarized and deliver it to election headquarters. During the 1994 election, numerous absentee ballots were fraudulently cast. The government alleged that Mr. Clark and Rawley caused false absentee ballots to be cast, violating tribal election laws and practices, and injuring and oppressing tribal members' right to vote in a tribal election.

Mr. Clark and his codefendants moved to dismiss the indictment filed against them for lack of jurisdiction. Adopting a magistrate's recommendation, the district court denied their motion. App. A-37. Mr. Clark was subsequently

convicted on all but one of the 23 counts against him. Although his appeal raised several issues concerning the validity of his convictions, at its core was his challenge to the exercise of federal jurisdiction in this case.

Affirming Mr. Clark's convictions on August 11, 1998, the United States Court of Appeals for the Eighth Circuit held that federal jurisdiction existed to prosecute him for tribal election fraud and the other offenses arising from his position as a tribal council member. Judge Beam, however, dissented with respect to Mr. Clark's election fraud convictions, concluding that federal courts lack jurisdiction over tribal election fraud prosecutions. Without opinion, on August 27, 1998, the Eighth Circuit summarily denied the petitions for rehearing filed by Mr. Clark and his codefendants.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT COURT OF APPEALS' UNPRECEDENTED EXTENSION OF JURISDICTION UNDER TITLE 18 U.S.C. § 241 TO PERMIT FEDERAL PROSECUTION OF TRIBAL ELECTION FRAUD, INTRUDES UPON PURELY INTERNAL TRIBAL MATTERS INVOLVING ISSUES ESSENTIAL TO TRIBAL SOVEREIGNTY, TRIBAL SELF-GOVERNMENT AND THE POLITICAL INTEGRITY OF THE TRIBE, AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

> The first element of sovereignty, and the last which may survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine its own form of government. Such power includes the right to define the powers and duties of its officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in the capacity as officials and the forms and procedures which are to attest to the character of acts, done in the name of the tribe.

Wounded Head v. Tribal Council, 507 F.2d 1079, 1082-83 (8th Cir. 1975)(quoting preeminent Federal Indian Law scholar Felix Cohen and holding that Voting Rights Act does not apply to tribal elections). In a case of first impression, decided by a two-to-one margin, the Eighth Circuit Court of Appeals' opinion in United States v. Wadena, 152 F.3d 831

(8th Cir. 1998), delivers a fatal blow to well-established principles of tribal sovereignty by permitting the federal prosecution of tribal election fraud. The core attribute of any sovereign political community is its ability to govern itself, and the most essential aspect of self-governance is the manner by which a society selects its political leaders. If, as a result of Wadena, tribes no longer possess the exclusive right to prosecute their members for tribal election fraud, the concept of tribal sovereignty becomes wholly illusory.

A. Tribal Sovereignty

Because Indian tribes were originally separate nations within the United States, they are sui generis under American law. Williams v. Lee, 358 U.S. 217, 219 (1959). As self-governing sovereign political communities existing before the Europeans' arrival, Indian tribes had and retain the inherent power to prescribe and enforce laws upon their members. United States v. Wheeler, 435 U.S. 313, 323 (1978). These unique historical origins of tribal sovereignty have resulted in a longstanding commitment to tribal self-determination. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). Recognizing the sovereignty of the Indian tribe as "a distinct political society, separated from others, capable of managing its own affairs and governing itself," Congress has consistently enacted laws which treated tribes as separate nations, capable of entering into treaties, and respected their rights to govern themselves. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). See also Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556, 559-61 (1832). These laws exhibit "Congress's jealous regard for Indian self-governance." Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890 (1986). See also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980)(federal policy promotes tribal self-

government); Fisher v. District Court, 424 U.S. 382, 391 (1976)(same).

Indian tribes possess those aspects of sovereignty not withdrawn by treaty, statute, or by necessary implication as a result of their dependent status. Wheeler, 435 U.S. at 323. The extent of their retained sovereignty is that "needed to control their internal relations, and to preserve their own customs and social order." Duro v. Reina, 495 U.S. 676, 685-86 (1990). See also Wheeler, 435 U.S. at 322; United States v. Antelope, 430 U.S. 641, 645 (1977); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 173 (1973). The portion of their sovereignty lost due to their dependent status involves only external relations between the tribe and nonmembers. Duro, 495 U.S. at 686. Powers of self-government "involve only relations among members of a tribe . . . [and] are not such powers as would necessarily be lost by virtue of a tribe's dependent status." Id. (quoting Wheeler, 435 U.S. at 326). A tribe's inherent sovereign right to govern itself includes the right to prescribe and enforce laws applicable to its members and regulate conduct affecting the tribe's political integrity. Id.; Montana v. United States, 450 U.S. 544, 566 (1981); Wheeler, 435 U.S. at 322.

This Court has recognized that "considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy . . . form an important backdrop against which the applicable treaties and federal statutes must be read." Three Affiliated Tribes, 476 U.S. at 884. Hence, "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." White Mountain, 448 U.S. at 143-44. See also McClanahan, 411 U.S. at 173 (statutes must be read in light of tradition of Indian sovereignty); F. Cohen, Handbook of Federal Indian Law 273 (1982 ed.) [hereinafter Cohen]

("statutes have been consistently construed to reserve the right of self-government to the tribes").

B. Intratribal Exception to Federal Jurisdiction

A necessary incident of this inherent sovereign power to control internal tribal relations is the intratribal exception to federal criminal jurisdiction. While many treaties permitted the federal government to prosecute crimes committed between Indians and non-Indians, nothing in them deprived tribes of their own jurisdiction over crimes committed between their members. Wheeler, 435 U.S. at 324. Implicit in such treaties "was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." Id. (quoting Williams, 358 U.S. at 222-23).

Federal statutes have likewise recognized a tribe's exclusive jurisdiction over crimes committed between its members. Id. For example, the Indian Country Crimes Act, Title 18 U.S.C. § 1152, and its predecessor statutes expressly contain an intratribal exception. Cohen at 163. The congressional intent underlying this exception is to permit Indians "to be governed by Indian usages and customs." United States v. Rogers, 45 U.S. (How.) 567, 573 (1846). See also Wheeler, 435 U.S. at 325 ("tribes have exclusive jurisdiction" over crimes committed between Indians on Indian land and "we can [not] with any justice or propriety extend our laws to them").

The purpose of the intratribal exception is to foster tribal self-government and allow tribes to resolve internal matters without federal interference. See Ex parte Crow Dog, 109 U.S. 556, 568-70 (1883). Its purpose is achieved by permitting intratribal crimes "to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform." Id. at 572.

That policy recognizes tribes as exempt from federal laws "in regard to their domestic government[s]." Id. (quoting United States v. Joseph, 94 U.S. 614, 617 (1876)). See also Duro, 495 U.S. at 690 (Congress has recognized and declined to disturb the traditional and undisputed power of tribes over their members); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204 (1978)(congressional policy is to allow Indian tribes criminal jurisdiction over all intratribal controversies). A departure from that longstanding policy "requires a clear expression of the intention of Congress . . . ." Id.

Relying upon the intratribal exception to invalidate an Indian's prosecution under a generally applicable federal law criminalizing adultery in United States v. Quiver, 241 U.S. 602 (1916), this Court commented:

> At an early period it became settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with according to their tribal customs and laws.

Id. at 603-04. The only modification of this consistent congressional policy occurred when Congress enacted the Indian Major Crimes Act, currently codified at Title 18 U.S.C. § 1153. Quiver recognized that § 1153 is the only exception to "the policy reflected by the legislation of Congress and its administration for many years, that the relations of Indians, among themselves--the conduct of one toward another--is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise." Id. at 605-06. See also Elk v. Wilkins, 112 U.S. 94, 100 (1884)("General acts of Congress did not apply to Indians,

unless so expressed as to clearly manifest an intention to include them").

Recent lower court authority supports the proposition that generally applicable federal criminal laws do not confer federal jurisdiction when their application would disrupt tribal authority, or infringe upon internal tribal matters or tribal self-government. For example, affirming the conviction of an Indian who sold drugs to another Indian on a reservation in United States v. Blue, 722 F.2d 383, 385 (8th Cir. 1983), the court upheld federal jurisdiction because it did not constitute an "infringement upon tribal sovereignty or self-government." Consistent with Quiver, the Eighth Circuit recognized that unless specifically provided by Congress generally applicable federal criminal laws do not confer jurisdiction in an intratribal context when their application would infringe upon internal tribal matters--the relation of Indians among themselves--or tribal self-government. Id. at 385-86.

Similarly, in United States v. Plainbull, 957 F.2d 724, 727 (9th Cir. 1992), the court recognized that the deference "federal courts must afford tribal courts concerning activities occurring on reservation land is deeply rooted in Supreme Court precedent." The Ninth Circuit observed that this Court "has recognized that tribal courts are appropriate forums for the exclusive adjudication of disputes over transactions taking place within the boundaries of a reservation." Id. Characterizing deference to tribal courts with regard to tribal affairs as "a fundamental tenet of federal jurisprudence," Plainbull further noted that "federal courts would undermine the ability of tribes to govern themselves by exercising jurisdiction over activities taking place on tribal lands." Id. at 727-28.

Likewise, in United States v. Funmaker, 10 F.3d 1327 (7th Cir. 1993), the court upheld jurisdiction under the generally applicable laws prohibiting damaging by fire a building used in interstate commerce and using a destructive

device in connection with a crime of violence. Finding that application of these laws neither infringed upon internal tribal matters nor tribal self-government, Funmaker observed:

> As a general rule, statutes written in terms of applying to all persons include members of Indian tribes as well. An exception, however, follows on the heels of the rule, namely that when application of a statute would affect Indian or tribal rights recognized by treaty or statute, or would affect rights essential to self-governance of intramural matters, the law specifically must evince Congressional intent to interfere with those rights.

Id. at 1330-31 (citations omitted). See also United States v. Boots, 80 F.3d 580, 593 (1st Cir. 1996)(upholding jurisdiction under the generally applicable wire fraud statute because its application in that case did not interfere with any Indian right "protected by statute or treaty, or right integral to self-government").

In Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995), the court enjoined state courts from ruling in a tribal political dispute in order to preserve tribal authority and protect tribal sovereignty. Holding that tribal authority over internal tribal matters is exclusive, Bowen observed that a dispute involves an internal tribal matter if it involves only tribal members, arises on the reservation and concerns the allocation of power within tribal government. Id. at 113, 125. A dispute involves matters of tribal self-government if it "calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body . . . ." R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 983 (9th Cir. 1983)

The tribal election fraud prosecuted in the case at bar was an internal tribal matter; it involved only tribal members, arose on the reservation and concerned the allocation of power within tribal government. Thus, jurisdiction rested exclusively with the tribe. Furthermore, the government's allegations of tribal election fraud created a dispute which called into question the validity or propriety of the tribe's elected government. Hence, the federal prosecution of tribal election fraud infringed the tribe's right to govern itself. Moreover, by threatening the political integrity of the tribe, that prosecution ignored the tribe's inherent power to regulate its purely internal matters and impermissibly intruded upon tribal sovereignty.

Dissenting from the Eighth Circuit's election fraud decision in this case, Judge Beam observed that the court failed to appreciate the tribe's "exclusive right to prosecute tribal election offenses, which is necessary to maintain political integrity." Wadena, 152 F.3d at 858. As Judge Beam recognized: "Monitoring tribal elections is an area traditionally left to tribal government and any contrary holding would violate the federal policy of respecting tribal sovereignty in the absence of express congressional authority." Id. No such congressional authority exists to support the Eighth Circuit's unprecedented extension of jurisdiction under Title 18 U.S.C. § 241 in the case at bar.

C. Title 18 U.S.C. § 241

Recognizing congressional policy not to interfere with state elections absent clear and specific provisions to the contrary, in United States v. Bathgate, 246 U.S. 220, 225 (1918), this Court held that a federal law prohibiting conspiracies to commit election fraud did not extend to a conspiracy to bribe voters at a general state election. Subsequently, in Anderson v. United States, 417 U.S. 211,

223 (1974), this Court assumed arguendo that Title 18 U.S.C § 241 extended only to conspiracies to cast false votes for **federal** officers. 417 U.S. at 227-28. Yet, Anderson left open the question of "whether 18 U.S.C. § 241 extends to conspiracies to cast votes in purely local elections in which no federal candidate is on the ballot." United States v. Townsley, 843 F.2d 1070, 1080 n.10 (8th Cir. 1988).

Unlike state and local elections, the Constitution does not apply to tribal elections. See Groundhog v. Keeler, 442 F.2d 674, 681-82 (10th Cir. 1971); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967). No constitutional guarantee of individual rights, including those contained in the Bill of Rights and the Fourteenth Amendment, applies to Indian tribes. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). See also United States v. Doherty, 126 F.3d 769, 777 (6th Cir. 1997)("neither the Bill of Rights nor the Fourteenth Amendment operates to constrain the governmental actions of Indian tribes, and the Supreme Court has consistently decided cases with that understanding").

Simply because a right exists under federal law does not mean that it may serve as the basis for a prosecution under Title 18 U.S.C. § 241. For example, § 241 does not extend to conspiracies to violate rights secured by either the Fourteenth Amendment or the National Labor Relations Act. United States v. Williams, 341 U.S. 70, 77-78 (1950); United States v. DeLaurentis, 491 F.2d 208 (2d Cir. 1974); United States v. Bailes, 120 F. Supp. 614, 622-27 (S.D. W. Va. 1954). In determining whether a particular federal statute may serve as the basis for a § 241 prosecution, its language and legislative history must clearly indicate that criminal penalties were intended for its violation. DeLaurentis, 491 F.2d at 212-14. Furthermore, the absence of similar § 241 prosecutions "in the nearly 30 years since" a statute's enactment indicates that Congress did not intend for criminal penalties to extend to its

violation. Id. Thus, simply because the Indian Civil Rights Act (ICRA) prohibits tribal governments from denying equal protection or due process, does not mean that it serves as a basis for a § 241 prosecution.

Logic suggests that if the Fourteenth Amendment's Equal Protection and Due Process Clauses cannot serve as bases for a § 241 prosecution, then neither can those contained in the ICRA. Furthermore, the absence of any similar § 241 prosecution for violations of the ICRA in the 30 years since its enactment indicates that Congress did not intend for criminal penalties to extend to its violation. Finally, an examination of its statutory language and legislative history further demonstrates that Congress did not intend for rights secured by the ICRA to serve as a basis for § 241 prosecutions.

D. Indian Civil Rights Act

In 1968, after seven years of hearings and negotiations with Indians, Congress enacted the Indian Civil Rights Act, Title 25 U.S.C. § 1302. See Note, The Indian Bill of Rights & the Constitutional Status of Tribal Courts, 82 Harv. L. Rev. 1343, 1355 (1969)[hereinafter Note]. Although the major goal of the Act was to strengthen tribal self-government, the original bill's proposed incorporation of the entire Bill of Rights was "intensely criticized as overly intrusive of the tribe's right of self-governance." Doherty, 126 F.3d at 779. Many Indians viewed it "as a further weakening of Indian self-government in the name of protecting Indians from their own people . . . [and] as another imposition by a white government of white standards, values, and governmental theory upon once sovereign tribes." Coulter, Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights, 3 Colum. Hum. Rts. L. Rev. 49, 50 (1970-71)[hereinafter Coulter]; Cohen at 661.

Accordingly, as reflected by the Act's legislative history, "Congress carefully balanced the desire to protect the rights of Native Americans with the desire to avoid extensive interference with internal tribal affairs" in an effort to preserve tribal autonomy, customs, law and culture. Doherty, 126 F.3d at 779. See also Ziontz, In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act, 20 S.D.L. Review 1, 2 (1975)[hereinafter Ziontz]. To maintain that delicate balance, federal courts must not interpret the ICRA in a manner which would "accelerate the process of federal erosion of tribal autonomy" and mold "the Indian to the image of the conquering nation." Coulter, 3 Colum. Hum. Rts. L. Rev. at 60-61, 73. Tribal autonomy would be seriously undermined if federal courts interpreted ICRA provisions as applicable to tribes in the same manner that the Constitution applies to state and federal government. See Doherty, 126 F.3d at 780; Note, 82 Harv. L. Rev. at 1355. Such an interpretation would be contrary to the Act's legislative history which reflects an intent to avoid impairing tribes' "capacity to function as autonomous governmental units." Id. at 1359.

Tribal notions of due process and equal protection often vary considerably from their Anglo-American counterparts. See Doherty, 126 F.3d at 780. Additionally, tribal culture is inconsistent with many aspects of the Bill of Rights. Cohen at 663. For example, "relationships based on family, clan, membership societies, and other groups have a much greater role in the internal regulation of tribal societies than in the migratory communities of modern America generally." Id. at 664 n.3. Consequently, "those courts that have considered the ICRA have held that constitutional law precedents applicable to the federal and state governments do not necessarily apply 'jot-for-jot' to the tribes." Doherty, 126 F.3d at 779 (noting that similarity between language of ICRA and Constitution does not demonstrate Congress intended ICRA provisions to

have same meaning). Courts construing the ICRA must remember that Congress has steadfastly supported a policy of permitting tribes to maintain their own governmental identity. Note, Harv. L. Rev. at 1355.

Among the many significant constitutional limitations of federal and state government which are not included in the ICRA are:

(1) the guarantee of a republican form of government;
(2) prohibitions against the denial of privileges of citizens; and
(3) provisions concerning **voting rights**.

Cohen at 667. See also id. at 667-68 n.40 (**ICRA omits any voting rights guarantee**). "The legislative history of the Act indicates that these omissions reflect a deliberate choice by Congress to limit its intrusion into traditional tribal independence." Id. at 667 (citing Santa Clara Pueblo, 436 U.S. at 66-70).

While "the care and compromise that went into [the ICRA] suggest that Congress would not silently import" criminal liability into its violations, a review of its legislative history conclusively demonstrates that Congress did not intend to authorize criminal prosecutions for conspiracies to violate rights guaranteed under the ICRA. DeLaurentis, 491 F.2d at 214. One of the bills introduced by Senator Ervin as part of the proposed legislation, SB 963, expressly authorized the Attorney General to investigate and **criminally** prosecute ICRA violations. Ziontz, 20 S.D.L. Rev. at 13-14. This bill encountered strong tribal opposition, however, on the grounds that it would subject tribal sovereignty to the federal government, and posed a danger that perpetually dissatisfied tribal members (dissidents) would abuse it to undermine, harass and disrupt existing tribal government. Id. at 14. The Department of Interior also opposed SB 963. Id. The bill was

ultimately dropped from the legislation because tribal leaders felt it would result in "substantial federal intrusion in tribal politics and internal conflicts." Id. at 17.

The ICRA's legislative history reveals a congressional intent "to take a first and limited step in imposing what are essentially Anglo-Saxon constitutional standards on Indian tribes." Id. at 18. Congress was well aware that should it appear that the tribal governments ignored the commandments of the Act so that additional remedies were needed, it could take such steps as were necessary and vest federal courts with additional jurisdiction. Id. Congress considered the role of the federal courts in enforcing the ICRA to be "narrowly circumscribed." Id. at 19. Thus, it deliberately refused to authorize the federal prosecution of ICRA violations, fearing it would result in a substantial intrusion by the federal courts into internal tribal matters. Id.

Congress also deliberately limited federal remedies to habeas corpus writs in cases involving alleged violations of the rights guaranteed under the ICRA. Id. Consequently, the ICRA vests only habeas jurisdiction in federal courts. Id. at 21. This extremely narrow jurisdictional grant is consistent with tribal sovereignty, which by its very existence precludes application of federal civil rights to tribal government actions. Id. at 29.

After reviewing the ICRA's legislative history, the Tenth Circuit concluded that the Act does not provide "any basis of federal court jurisdiction over tribal elections . . . ." Groundhog, 442 F.2d at 682. See also Runs After v. United States, 766 F.2d 347, 351 (8th Cir. 1985)(federal courts lack jurisdiction over tribal election disputes). Subsequently, Wheeler v. Swimmer, 835 F.2d 259, 262 (10th Cir. 1987), recognized that a tribe's "right to conduct an election without federal interference is essential to the exercise of the right to self-government." Wheeler also observed that when enacting the ICRA, Congress "elected to impose less supervision on

tribal administration of civil rights disputes than it imposes on federal and state governments. The Act's legislative history indicates that this reflects a deliberate choice by Congress to limit intrusion into traditional tribal rights." Id. at 261.

Both Wheeler and Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989), held that rights secured by the ICRA do "not provide an independent basis for suit under" Title 42 U.S.C. §§ 1985(3) and 1986--statutes which (like Title 18 U.S.C. § 241) prohibit conspiracies to violate civil rights. Id. at 1462. The Fourth and Ninth Circuits have similarly ruled that rights secured by the ICRA do not confer federal jurisdiction under Title 28 U.S.C. § 1343(4), a statute which provides civil remedies for the violation of civil rights--including the right to vote. See Boe v. Fort Belknap, 642 F.2d 676 (9th Cir. 1981); Crowe v. Eastern Band of Cherokee Indians, 584 F.2d 45 (4th Cir. 1978).

The Eighth Circuit's conclusion that the ICRA guarantees tribal voting rights which are enforceable under § 241 disregards the statutory language of the ICRA, its legislative history and Congress' intent to avoid federal interference with internal tribal affairs. The ICRA contains no tribal voting rights guarantee. Furthermore, differences between tribal and Anglo-American notions of due process and equal protection suggest that the Act's guarantee of these rights does not make them equivalent to their constitutional counterparts. The Act's language simply fails to contain the specific and unequivocal expression of congressional intent necessary to abrogate tribal self-government rights.

Moreover, the Act's legislative history reveals a congressional reluctance to intrude upon tribal sovereignty and self-governance. It is difficult to imagine anything more intrusive upon tribal self-government than a federal prosecution for tribal election fraud. As Judge Beam noted in his dissenting opinion in this case, "the exclusive right to prosecute members for fraud in a tribal election is a necessary

and intimate aspect of tribal self-government." Wadena, 152 F.3d at 857.

The Act's legislative history also reveals that Congress rejected a specific proposal to authorize criminal prosecutions of ICRA violations, fearing that such prosecutions would result in too great an intrusion into tribal politics and internal affairs. Thus, even if the ICRA did guarantee tribal voting rights, violations of those rights would not be subject to federal criminal prosecution.

E. Santa Clara Pueblo v. Martinez

This Court carefully examined the ICRA in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The issue presented in that case was whether federal jurisdiction existed over a suit brought pursuant to Title 25 U.S.C. § 1302 (8), the Equal Protection Clause of the ICRA, challenging a tribal law denying membership to children of certain female members. Id. at 51. The ICRA does not expressly authorize civil actions to enforce its provisions and this Court ruled that Congress did not implicitly authorize such lawsuits. Id. at 51-52.

Citing Cohen, this Court initially reaffirmed that Indian tribes retain their original natural rights in matters of self-government, including the powers to regulate internal and social relations, and to make their own substantive law in internal matters and enforce it in their tribal courts. Id. at 55-56. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by the constitutional provisions framed specifically as limitations on federal or state authority." Id. at 56. Noting that the only remedial provision supplied in the ICRA is habeas relief, this Court cautioned that providing a federal forum for issues arising under the ICRA would interfere with tribal autonomy and self-government. Id. at 58.

The Santa Clara Pueblo Court realized that "resolution in a foreign forum of intratribal disputes of a [ ] 'public' character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority." Id. at 60. Therefore, out of proper respect for tribal sovereignty, this Court refused to find a cause of action absent clear legislative intent. Id. Upon analyzing that legislative intent, this Court concluded that Congress deliberately intended to limit ICRA remedies to the writ of habeas corpus. Id. at 61. The ICRA reflected Congress' policy to further Indian self-government and tribal self-determination, and to protect tribal sovereignty from undue influence. Id. at 62. According to this Court, a federal cause of action to enforce the ICRA "plainly would be at odds with the congressional goal of protecting tribal self-government. . . . [I]t would undermine the authority of tribal forums . . . ." Id. at 64.

Santa Clara Pueblo recognizes that no federal remedy beyond habeas is required to enforce ICRA provisions: "Tribal forums are available to vindicate rights created by the Indian Civil Rights Act, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply." Id. at 65. Under Santa Clara Pueblo, tribal courts and nonjudicial institutions are the appropriate and competent bodies to apply and enforce the ICRA. Id. at 65-66. This Court's review of the ICRA's legislative history also revealed that Congress explicitly rejected an enforcement mechanism far more intrusive than a private civil cause of action: **Congress rejected a provision which would have allowed the Attorney General to prosecute criminal violations of the ICRA**. Id. at 67-71. No remedy more intrusive on tribal sovereignty and autonomy, and more threatening to tribal self-government and self-determination is imaginable. Furthermore, no remedy is more inconsistent with Congress' deliberate selection of the most limited federal remedy available--the writ of habeas corpus--in order to

minimize its concern over the intrusive effect that federal review would have on tribal self-government. See id.

Finally, the Santa Clara Pueblo Court observed that the resolution of issues likely to arise under the ICRA will "depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." Id. at 71. "[T]ribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments." Id. This Court concluded by warning that efforts to enforce the ICRA in a **civil** context "may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." Id. at 72. As Mr. Clark's tribal election fraud prosecution vividly illustrates, enforcing the ICRA in a criminal context results in far greater and more direct threat to a tribe's political integrity.

The Eighth Circuit's conclusion that Santa Clara Pueblo does not control the case at bar cannot survive scrutiny. While the actual holding in that case is limited to a determination that no civil private right of action exists for ICRA violations, this Court's reasoning and analysis of the Act's legislative history apply with even greater force to criminal prosecutions of ICRA violations. This Court concluded that the ICRA created no private right of action because Congress did not specifically authorize one and such an enforcement mechanism would impermissibly interfere with tribal sovereignty and self-government. Not only does the ICRA expressly fail to authorize criminal prosecution of its violations, Congress specifically rejected a provision which would have authorized such prosecutions.

Furthermore, a criminal prosecution for tribal election fraud threatens tribal sovereignty and self-government far more than any civil private right of action. Reluctant to interfere with purely tribal matters, Congress very carefully

limited federal enforcement of the ICRA to writs of habeas corpus. The Eighth Circuit's unprecedented extension of federal criminal jurisdiction to prosecutions of tribal election fraud completely disregards the delicate balance Congress struck when it enacted the ICRA.

Moreover, the Eighth Circuit's conclusion that federal prosecution of tribal election fraud does not interfere with tribal sovereignty and self-government because it does not challenge the "legitimate" actions of a tribe or its representatives, and no effective tribal forum exists to protect tribal members from their corrupt political leaders, is seriously flawed. Completely ignoring the presumption of innocence, this conclusion presumes that all allegations of tribal election fraud and corruption are true. Yet, Congress rejected the proposed criminal prosecution of ICRA violations in part due to tribal leaders' fears that tribal members dissatisfied with an election's outcome would falsely allege tribal election fraud. The court's conclusion is further flawed because it succumbs to "the paternalistic temptation to assert jurisdiction based on the subjective belief that federal intervention is the only way to protect the civil rights of tribal members." Wadena, 152 F.3d at 857 (Beam, J., dissenting).

II. THE EIGHTH CIRCUIT'S DECISION IN THIS CASE, THAT INDIANS COMMITTING CRIMES AGAINST OTHER INDIANS IN INDIAN COUNTRY ARE SUBJECT TO PROSECUTION UNDER GENERALLY APPLICABLE FEDERAL LAWS, REGARDLESS OF WHETHER SUCH PROSECUTIONS INVOLVE PURELY TRIBAL MATTERS OR INTRUDE UPON TRIBAL SOVEREIGNTY, CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS ON THIS IMPORTANT MATTER.

> Federal Indian law is complex and federal criminal jurisdiction especially complex. Leading scholars have observed that the field is a "maze," a "crazy-quilt" woven from sometimes ill-matched federal, state, and tribal strands.

Garnett, Once More into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country, 72 N.D.L. Rev. 433, 441-42 (1996)(footnotes omitted). See also Negonsott v. Samuels, 507 U.S. 99, 102 (1993)(federal criminal jurisdiction in Indian country results from "a complex patchwork of federal, state, and tribal law"). Numerous confusing and inconsistent opinions issued by courts of appeals in various circuits have contributed significantly to the complexity of this jurisdictional maze. Wadena, 152 F.3d at 841. Until this Court resolves these conflicts, confusion will persist over the extent to which Indians may be federally prosecuted.

In the Fourth Circuit's view, federal criminal jurisdiction over crimes committed between Indians on reservations is confined exclusively to the 14 offenses specifically enumerated in the Indian Major Crimes Act, Title 18 U.S.C. §

1153. See United States v. Welch, 822 F.2d 460 (4th Cir. 1987). The Ninth and Sixth Circuits lie at the opposite end of the jurisdictional spectrum, holding that Indians may always be prosecuted for violating generally applicable federal laws. See United States v. Begay, 42 F.3d 486 (9th Cir. 1994); United States v. Yannott, 42 F.3d 999 (6th Cir. 1994).

Between these divergent views is the position adopted by the Second and Seventh Circuits, under which general federal criminal laws apply to Indians within Indian country only if they seek to protect a "peculiar" federal interest. See United States v. Markiewicz, 978 F.2d 786 (2d Cir. 1992); United States v. Smith, 562 F.2d 453 (7th Cir. 1977). In accordance with Quiver, the Eighth Circuit previously recognized that general federal laws applied to tribal crimes unless prosecution would infringe upon internal tribal matters, tribal sovereignty or self-government. See United States v. Blue, 722 F.2d 383 (8th Cir. 1983).

The Eighth Circuit's decision in the case at bar, however, clearly abandons this approach in favor of a "newly minted balancing test, not fairly supported . . . anywhere within the recorded annals of American Indian litigation, weighing federal interests against tribal interests. The result is a vague and incoherent test for jurisdiction." Wadena, 152 F.3d at 858 (Beam, J., dissenting)(internal citation omitted). As we approach the new millennium, it is time for this Court to resolve the conflicts existing among the courts of appeals on this important issue.

CONCLUSION

For the foregoing reasons, petitioner Rick Clark respectfully requests this Court to grant his petition for writ of certiorari.

Respectfully submitted,

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Dated: November 25, 1998

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATES OF AMERICA, Crim. No. 3-95-102(1-6)

Plaintiff,

v. REPORT AND RECOMMENDATION

DARRELL "CHIP" WADENA,
JERRY RAWLEY,
RICK CLARK
PETER G. PEQUETTE, JR.,
HENRY HARPER, and
CARLEY JASKEN,

Defendants.

Assistant United States Attorney Kenneth Saffold, Esq., for the United States.

John C. Brink, Esq., for Defendant Darrell "Chip" Wadena.
Peter B. Wold, Esq., for Defendant Jerry Rawley.
Peter C. Mayrand, Esq., for Defendant Rick Clark.
Douglas H.R. Olsen, Esq., for Defendant Peter G. Pequette, Jr.
Charles W. Faulkner, Esq., for Defendant Henry Harper.
Glen Binder, Esq., for Defendant Carley Jasken.

THIS MATTER came before the Court on November 28, 1995 for a hearing on Defendants' pretrial motions for

severance, suppression of statements and evidence and dismissal of the Indictment. All Defendants were represented by counsel and were personally present in the courtroom.

In addition to the arguments of counsel, the Court has considered testimony of Special Agents Michael Nelson, Timothy Reed and David Barnes and the affidavits and memoranda submitted by the parties.

SUMMARY OF DECISION

This Court recommends that Defendants' motions to sever the trial on the charges set forth in Counts 1 through 28 of the Indictment from the trial on the charges set forth in Counts 29 through 44 be granted (28 U.S.C. § 636(b)(1)(A) and (B)). It recommends that the other motions of Defendants be denied.

I. SUPPRESSION ISSUES —

A. Testimony

Special Agent Michael Nelson of the Internal Revenue Service testified that he met with Defendants Rawley and Clark on March 1, 1994. Before approaching the Defendants, Agent Nelson spoke with the tribal attorney for the White Earth Band of Chippewa, Mr. Cannon, and informed him that he intended to talk to individual members of the tribal counsel regarding an investigation of Northern Drywall and Construction. Mr. Cannon told Agent Nelson that he represented the tribe itself, not individual members.

Agents Nelson and Reed met with Defendant Jerry Rawley at Rawley's office in the tribal headquarters in Mahnomen, Minnesota. The Agents identified themselves as special agents with the Criminal Division of the IRS. Mr. Rawley spoke with the Agents voluntarily, and no threats or

promises were made during the interview, which lasted about fifteen minutes. The Agents did not give Mr. Rawley any Miranda warnings.

On the same day, Agents Nelson and Reed met with Defendant Rick Clark at Clark's office in the tribal headquarters in Mahnomen, Minnesota. (See Defendant Clark's Exhibit 1). The Agents identified themselves and advised Mr. Clark that his participation in the interview was voluntary. They made no threats or promises during the interview and Mr. Clark agreed to speak with them. They did not give any Miranda warnings to Mr. Clark. At the end of the interview, Agent Nelson asked Mr. Clark why he had given Chip Wadena a half interest in Northern Drywall and Construction. At that point, Mr. Clark stated that he needed to speak to an attorney before answering any more questions and the interview was terminated.

Agent Nelson also testified that on March 3, 1994 he met with William Norris, owner of Thunderbird Drywall. After receiving approval from his supervisor, and speaking with Mr. Norris' attorney, Mr. Ostegaard, Agent Nelson obtained consent from Mr. Norris to monitor Norris' telephone conversations with Defendant Clark. Mr. Norris agreed to record his conversations with Mr. Clark. No threats or promises were made in order to obtain Mr. Norris' consent.

On September 15, 1994, Agents Nelson and David Barnes met with Defendant Henry Harper at Harper's office in Leach Lake, Minnesota. The Agents identified themselves and asked questions regarding the White Earth Reservation election process and the notarization of absentee ballots. Mr. Harper agreed to speak with the Agents and they made no threats or promises to Mr. Harper during the interview. The Agents did not give Mr. Harper Miranda warnings, and the entire interview lasted about ten minutes.

Also on September 15, 1994, Agent Reed contacted Defendant Peter Pequette by telephone and identified himself

as a special agent in the Criminal Division of the IRS. Mr. Pequette agreed to speak to him regarding his involvement as a notary with respect to the White Earth elections. Agent Reed spoke with Mr. Pequette for about thirty minutes at Pequette's residence in Minneapolis, Minnesota. Agent Reed made no threats or promises and at no time did Mr. Pequette ask to discontinue the interview.

On October 6, 1994, Agent Nelson served a grand jury subpoena on Mr. Pequette at Pequette's place of employment. He spoke with Mr. Pequette outside the building for a couple of minutes, explaining the grand jury subpoena. Mr. Pequette volunteered that he did not know what the subpoena was all about and that he had told the agent the truth at the earlier interview.

Special Agent David Barnes of the Department of the Interior testified that he was present at the interview of Defendant Henry Harper. He stated that he took notes but that Agent Nelson was the primary interviewer. The subject of the interview was Mr. Harper's participation in the tribal elections of the White Earth Band of Chippewa. Agent Barnes also testified that his investigation into the misapplication of funds and election fraud began in February of 1994. He stated that the relationship of the misapplication of funds to the election fraud is that elected officials are in the best position to access and misapply funds.

B. Conclusions of Law

1. No Custodial Interrogations

Miranda v. Arizona, 384 U.S. 436 (1966) requires that a suspect who is "in custody" be advised of certain rights. The evaluation of whether a suspect is "in custody" turns on "the extent of the physical or psychological restraints placed on the suspect during interrogation in light of whether a 'reasonable

person in the suspects' position would have understood his situation' to be one of custody." United States v. Griffin, 922 F.2d 1343, 1347 (8th Cir. 1990) (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)). The Eighth Circuit has consistently applied the six factor analysis developed in Griffin to determine whether a suspect is in custody. See, e.g., United States v. Jenner, 982 F.2d 329 (8th Cir.), cert. denied, 114 S.Ct. 81 (1983); United States v. Mottl, 946 F.2d 1366, 1368 (8th Cir. 1991).

Applying the Griffin standard, the interviews by the Agents in this case were not "custodial interrogations." All Defendants were interviewed either at home or at their places of work. In each case, the Agents identified themselves and asked if they could speak with the Defendants. The Defendants voluntarily spoke with the Agents and were free to discontinue questioning at any time, as Defendant Clark did in his interview. No threats or promises were used to obtain information and none of the Defendants was arrested immediately following their interview. Under these circumstances, Defendants were not "in custody" at the time they were interviewed and Miranda warnings were not required.

2. Telephone Recordings of Defendant Clark

Neither the Fourth Amendment nor 18 U.S.C. § 2511 are violated "when a defendants conversation with a government informant is recorded with the consent of the informant." United States v. Tangeman, 30 F.3d 950, 952 (8th Cir. 1994), cert. denied, 115 S.Ct. 532 (1994), citing United States v. Diaz, 685 F.2d 252, 254 (8th Cir 1982); see also 18 U.S.C. § 2511(2)(d). The court considers the voluntariness of the consent under the totality of the circumstances. Id.

In the present case, the recordings taken of Defendant Rick Clark were obtained through William Norris, by

recording device on Norris' telephone. William Norris consented to record his conversations with Mr. Clark. Mr. Norris' consent was given voluntarily, without threats or promises from the investigating agents, and with the consent of his attorney. Accordingly, the recordings taken by Mr. Norris of Defendant Clark should not be suppressed. See Tangeman, 30 F.3d at 952.

3. Statements by Defendant Clark

At the motions hearing Defendant Clark moved to suppress all inculpatory statements, alleging that the Government had represented that there were no statements by Defendant Clark that would necessitate consideration at a pretrial hearing. See Affidavit of Peter C. Mayrand [Docket No. 211].

Counsel for Defendant had ample notice that the Government intended to introduce recorded statements of Defendant Clark (see Government's response to Non-dispositive Pretrial Motions, p. 7 [Docket No. 198]), and was informed prior to the hearing that the Government intended to introduce other statements of Mr. Clark. See Affidavit of Peter C. Mayrand (Defendant's Counsel was informed on November 22, 1995 that the Government intended to introduce statements of Defendant Clark from March of 1994). There is no indication of any constitutional violations regarding the statements taken from Mr. Clark. Under these circumstances, Defendant Clark was not prejudiced and the statements need not be suppressed.

4. Other Statements and Electronic Surveillance

Since no statements or evidence of electronic surveillance were presented with respect to Defendants Wadena and

Jasken, their motions to suppress such evidence should be denied as moot.

5. Physical Evidence

No evidence regarding the recovery of physical evidence was presented at the motions hearing. Accordingly, the motions to suppress evidence by Defendants Pequette, Harper and Wadena should also be denied as moot.

6. Suppression of evidence from Grand Jury Subpoena

Defendant Jasken moved to suppress evidence obtained by agents of the Department of Justice on the grounds that the agents and the prosecution abused the grand jury process by using subpoenas to obtain evidence. No evidence or argument was submitted in support of this motion. There is nothing in the record which indicates that the Government improperly used the grand jury process to obtain evidence in this case. Accordingly, Defendant's motion to suppress evidence should be denied.

II. SEVERANCE

A. The Indictment

The Defendants are charged under a forty-four Count Indictment dated August 29, 1995. Count 1 alleges that Defendants Wadena, Rawley and Clark conspired to misapply tribal funds in violation of 18 U.S.C. § 1163 and 18 U.S.C. § 666 with respect to the construction of the Shooting Star Casino. The object of the alleged conspiracy was to use funds of the White Earth Band of Chippewa Indians for personal gain in the construction of the Shooting Star Casino. Counts

2 through 18 allege specific acts of money laundering and misapplication of funds by Clark, Rawley or Wadena in furtherance of the conspiracy.

Count 19 alleges that Defendants Wadena, Rawley and Clark conspired in the misapplication of tribal funds in violation of 18 U.S.C. § 1163 with respect to the formation

of a fishing commission. The object of the alleged conspiracy was to obtain funds from the White Earth Band of Chippewa Indians in the form of exorbitant commission payments for service on a functionless fishing commission. Counts 20 through 28 allege specific acts by Clark, Rawley or Wadena relating the to fishing commission conspiracy.

Count 29 alleges that Defendants Rawley, Clark, Jasken, Pequette, and Harper conspired to injure and oppress voters in the free exercise of rights and privileges in violation of 18 U.S.C. § 241. The object of the alleged conspiracy was to secure the election of candidates supported by Defendants by causing election judges to corruptly discharge their duties and causing ballots to be fraudulently cast in the names of persons who did not vote. Counts 30 to 44 allege specific acts in relation to the election fraud conspiracy including misapplication of funds in violation of 187 U.S.C. § 1163, mail fraud in violation of 18 U.S.C. § 1341, false statements in violation of 18 U.S.C. § 1001, and obstruction of justice in violation of 18 U.S.C. § 1503, by Defendants Rawley, Clark, Pequette, Harper, and Jasken.

B. Motions to Sever Counts 1-28 from Counts 29-44

Defendants Wadena, Rawley and Pequette have moved to sever Counts 1-28 from Counts 29-44 of the Indictment. Defendants argue that Counts 29-44 are not properly joined under Rule 8 of the Federal Rules of Criminal Procedure because they involve acts and transactions separate and unrelated to those alleged in Counts 1-28.

Where multiple defendants are jointly indicted for multiple offenses, the court applies Rule 8(b) of the Federal Rules Criminal Procedure. See United States v. Jones, 880 F.2d 55, 60-61 (8th Cir. 1989). Rule 8(b) states:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

The Eighth Circuit has held that the misjoinder of defendants is inherently prejudicial and the district court has no discretion to deny severance of such defendants. United States v. Bledsoe, 674 F.2d 647, 654 (8th Cir.), cert. denied, Phillips v. United States, 459 U.S. 1040 (1982). The propriety of joinder must appear on the face of the indictment. Id. at 655.

In evaluating joinder under Rule 8(b), the "court must balance its obligation to avoid prejudice that may result from joining multiple defendants against a policy favoring maximum trial efficiency." Id. "It is not necessary that each defendant have participated in each act or transaction," the inquiry under Rule 8(b) is "whether the acts or transactions are part of a closely related series and whether each defendant participated in the series of acts or transactions." United States v. Wofford, 562 F.2d 582, 585 (8th Cir. 1977), cert. denied, 435 U.S. 916 (1978). "Multiple groups and the performance of separate crimes or acts do not rule out the possibility that one overall conspiracy exists." United States v. Snider, 720 F.2d 985, 988 (8th Cir. 1983), cert. denied, 465 U.S. 1107 (1984). "The common purpose of a single enterprise must motivate each participant and each act, but

mere knowledge of another similarly motivated conspiracy or an overlap in personnel do not prove one overall agreement." Id.

In the present case, the Indictment alleges three conspiracies: misapplication of funds regarding construction of the shooting star casino; misapplication of funds regarding the fishing commission; and election fraud. The first two conspiracies, in Counts 1 through 28 of the Indictment, involve the alleged misapplication of funds by Defendants Wadena, Rawley and Clark. No motion to sever these Counts is before the Court. The acts and transactions relating to the construction of the casino and the forming of the fishing commission involve alleged misapplication of tribal funds and money laundering by the same three defendants, Defendants Wadena, Clark and Rawley. Defendants Pequette, Harper and Jasken are not charged in any of these counts.

The alleged election fraud conspiracy, in Counts 29-44 of the Indictment, relates to the tribal election in which Defendant Clark was elected to the position of District I committeeman and Defendant Rawley was elected to the position of secretary/treasurer. The Indictment describes the roles of Defendants Jasken, Harper and Pequette in furthering the election fraud conspiracy. Defendant Wadena is not named in the election fraud conspiracy or in Counts 29 through 44 of the Indictment.

From the face of the Indictment, it does not appear that there is a single, common purpose connecting the election fraud allegations to the casino and fishing commission allegations. Logically, Defendant Wadena had an interest in helping his alleged coconspirators maintain their positions on the tribal council, and Defendants Jasken, Harper and Pequette had an interest in the profits from the alleged casino and fishing commission conspiracies. However, the Indictment does not clearly allege such a connection between the conspiracies and the Defendants. The involvement of

Defendants Clark and Rawley in both the alleged election fraud conspiracy and the conspiracy to misapply funds is alone insufficient to show one over-all agreement and justify joinder under Rule 8(b). See United States v. Snider, supra, 720 F.2d at 988 (the court found two conspiracies to grow marijuana on farm land were misjoined because some members of second conspiracy had no knowledge or connection to the first conspiracy). Therefore, the court recommends that Counts 1 through 28 be severed from Counts 29 through 44 of the Indictment.

C. Motions of Pequette and Jasken to Sever Defendants under Rule 14

Defendants Jasken, Pequette, Rawley, Clark and Harper are charged with conspiracy to commit election fraud in Counts 29-44. Defendants Jasken and Pequette have each moved to sever their trial from that of all other defendants, each arguing under Fed. R. Crim. P. 14 they would be prejudiced by joinder with any other defendant in the trial of the charges in Counts 29-44.

It is well-settled that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same transaction or series of transactions constituting an offense or offenses. Fed. R. Crim. P. 8(b). Where defendants are indicted together and charged with a single conspiracy, the general rule in the federal system is that a defendant and his co-conspirators should be tried together. Zafiro v. United States, __ U.S. __, 113 S.Ct. 933, 937 (1993); United States v. Stephenson, 924 F.2d 753, 761 (8th Cir. 1991), cert. denied 502 U.S. 813 (1991) (it will rarely be improper for co-conspirators to be tried together). Joinder of Defendants Jasken, Pequette, Rawley, Clark and Harper is proper under Rule 8(b) with respect to Counts 29 through 44 of the Indictment as these Counts relate to a single conspiracy.

Under Rule 14, the court may grant a severance of defendants if it appears that a defendant is prejudiced by a joinder of defendants at trial. The decision whether to grant severance under Rule 14 is discretionary with the trial court. A court "should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro 113 S.Ct. at 938.

Defendant Jasken argues she will be prejudiced because the evidence of her involvement in the conspiracy is minimal, the defenses of individual defendants may be antagonistic, and the jury will be unable to "compartmentalize" the evidence against her. Defendant Pequette argues he will be prejudiced because the evidence may be introduced against him which would be inadmissible in a separate trial, there may be antagonistic defenses, and co-defendant testimony will be unavailable to him.

The Defendants have not specified how the parties' defenses would be antagonistic or prejudicial, or what testimony is not now available that would be available in a separate trial. Defendants' conclusory allegations of prejudice do not amount to the "showing of real prejudice" which is required before severance is mandated. United States v. Garrett, 961 F.2d 743, 746 (8th Cir. 1992); United States v. Givens, 712 F.2d 1298, 1300 (8th Cir. 1983), cert. denied, 465 U.S. 1009 (1984). Severance is not required "simply because evidence may be admissible as to one defendant but not as to another." United States v. Helmel, 769 F.2d 1306, 1322 (8th Cir. 1985). "The mere fact that there is hostility among the defendants or one defendant may try to save himself or herself at the expense of another is not sufficient grounds to require separate trials." Garrett, 961 F.2d at 746. Nor are separate trials required "merely because evidence

against one defendant is more damaging that the evidence against another." Id.

Defendants also argue they will be prejudiced by a joint trial because the Government may introduce incriminating statements of co-defendants which would be admissible as to the co-defendants, but hearsay as to them. Citing Bruton v. United States, 391 U.S. 123 (1968), Defendants argue they will be denied the right to confrontation under the Sixth Amendment if co-defendants who made incriminating statements do not take the stand at trial.

Bruton does not require severance whenever the government introduces out-of-court statements by a co-defendant, "it only addresses the introduction of statements, such as a confession, which expressly implicate a co-defendant." United States v. Sparks, 949 F.2d 1023, 1027 (8th Cir. 1991) cert. denied McGhee v. United States, 504 U.S. 927 (1992). At this point, it is not clear whether any statements of co-defendants would expressly implicate other defendants, or whether the co-defendants would testify at trial. Accordingly, Defendants motions for severance of Defendants under Fed. R. Crim. P. 14 should be denied. Obviously, if a Bruton issue arises at trial, the district court may reconsider this issue.

III. JURISDICTION

Defendants moved to dismiss the Indictment arguing that this court is without subject matter jurisdiction over the charged offenses. Defendants contend that there is no criminal jurisdiction over Indian against Indian offenses in Indian country,[1] and even if there were, Congress waived

[1] The terms "Indian" and "Indian country" are used in the prevailing statutes and case law. The court uses these terms here for purposes of consistency and clarity.

subject matter jurisdiction over the offenses charged in this case through the enactment of Public Law 280 in 1953.

A. Federal Criminal Statutes of General Applicability

Generally, courts have recognized Indian nations as quasi-sovereign entities with the power to regulate their own affairs except where Congress has modified or abrogated that power by treaty or statute. Stone v. United States, 506 F.2d 561, 563 (8th Cir. 1974), cert. denied, 420 U.S. 978 (1975). However, courts have also recognized that the "regulation of criminal activity in Indian country is one area where competing federal interests may override tribal interests." United States v. Begay, 42 F.3d 486, 498 (9th Cir. 1994), cert. denied, 116 S.Ct. 93 (1995), citing United States v. Markiewicz, 978 F.2d 786, 797 (2nd Cir. 1992), cert. denied, 113 S.Ct. 1065 (1993).

The Eighth Circuit has identified three general areas of federal criminal jurisdiction over Indians in Indian country: the Indian Country Crimes Act; the Indian Major Crimes Act; and federal criminal statutes of general applicability. The Indian Country Crimes Act, 18 U.S.C. § 1152, extended federal enclave jurisdiction to crimes committed in Indian country. Enclave laws are "those laws passed by the federal government in the exercise of its police powers over federal property and now defined in the United States Criminal Code in terms of 'special maritime and territorial jurisdiction of the United States,' 18 U.S.C. § 7." United States v. White, 508 F.2d 453, 454 (8th Cir. 1974). These enclave laws, by definition, are laws where the location or situs of the offense is an element of the crime. See Begay, 42 F.3d at 498. None of the charges in the Indictment are location specific under the enclave jurisdiction of section 1152.

The Indian Major Crimes Act, 18 U.S.C. § 1153, granted federal jurisdiction over fourteen specific crimes committed

in Indian country by one Indian against another. This statute was enacted in response to Ex Parte Crow Dog, 109 U.S. 556 (1883), where the Supreme Court found that federal courts had no jurisdiction under § 1152 over a murder in Indian country of one Indian by another. None of the offenses charged in the present case is among those listed in section 1153.

General federal criminal statutes that make actions criminal wherever committed are a third source of federal criminal jurisdiction over Indians. The Eighth Circuit has consistently held that "18 U.S.C. § 1152 and its exceptions do not extend or restrict the application of general federal criminal statutes to Indian reservations." E.g. United States v. Blue, 722 F.2d 383, 384 (8th Cir. 1983). Jurisdiction in the present case derives from these federal criminal statutes of general applicability.

In United States v. Stone, 506 F.2d 561 (8th Cir. 1974), cert. denied, 420 U.S. 978 (1975), the court considered whether there was federal jurisdiction over an assault in Indian country by an Indian against an Indian Bureau of Indian Affairs officer. The court held that the exemption in section 1152 "does not encompass the laws of the United States that make actions criminal wherever committed." Id. at 563.

In United States v. McGrady, 508 F.2d 13 (8th Cir. 1974) cert. denied, 420 U.S. 979 (1975), McGrady was charged with three counts of violating 18 U.S.C. § 1163 for misapplying funds from the Fort Berthold Indian Reservation in North Dakota. McGrady, relying on 18 U.S.C. § 1152, argued that the general criminal laws of the United States did not apply to Indian against Indian crimes in Indian country. The Eighth Circuit, citing Stone, found that the exemption in section 1152 refers only to laws where situs is an element of the offense. Id. at 16. The court found that the district court had subject matter jurisdiction because 18 U.S.C. § 1163 makes

certain actions criminal regardless of where they are committed. Id.

In United States v. Blue, 722 F.2d 383 (8th Cir. 1983), Blue was charged with violation of 18 U.S.C. § 841(a)(1) for intent to possess and distribute marijuana. The Eighth Circuit again concluded that "18 U. S. C. § 1152 and its exceptions do not extend or restrict the application of general federal criminal statutes to Indian reservations. The statute applies only to federal enclave laws and does not encompass federal laws that make actions criminal wherever committed." Id. at 384. The court adopted this interpretation as "generally valid and applicable to all general federal criminal laws" not just those of a "peculiarly federal nature." Id. at 385. The court specifically noted that there was no further infringement upon tribal sovereignty or self government because no traditional Indian right or tribal concern is threatened by enforcement of the federal drug laws. Id.

The Ninth Circuit has also found that federal courts have subject matter jurisdiction over Indians in Indian country by way of general criminal statutes. See United States v. Begay, 42 F.3d 486 (9th Cir. 1994); United States v. Burns, 529 F.2d 114 (9th Cir. 1975). In Begay, 42 F.3d at 499, the court found that the conspiracy law, 18 U.S.C. § 371, "is a federal criminal statute of general applicability, and therefore applies equally to everyone everywhere within the United States, including Indians in Indian country."

In the present case, Defendants have been charged with numerous violations of federal law including: 18 U.S.C. § 241 (election fraud); 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 1163 (misapplication of funds); 18 U.S.C. § 666 (bribery); 18 U.S.C. § 1957 (money laundering); 18 U.S.C. § 1341 (mail fraud); and 18 U.S.C. § 1001 (false information to a federal agency). Under these statutes, situs is not an element of the offense. Instead, they are general federal criminal statutes

which apply regardless of where the criminal acts are committed.

In addition, many of the offenses charged in the present case have peculiarly federal elements and are not Indian against Indian offenses. Money laundering under 18 U.S.C. § 1957 involves a monetary transaction affecting interstate or foreign commerce by, through or to a financial institution. Mail fraud under 18 U.S.C. § 1341 involves matters sent to or delivered by the United States Postal Service. False Information under 18 U.S.C. § 1001 involves false statements "in any matter within the jurisdiction of any department or agency of the United States." Obstruction under 18 U.S.C. § 1503 involves the obstruction of justice in a federal criminal investigation. Election fraud under 18 U.S.C. § 241 requires injury or oppression of a right secured by the laws of the United States.

Finally, Congress specifically granted federal jurisdiction with respect to those charges brought under 18 U.S.C. § 1163 and § 666. See United States v. Markiewicz, 978 F.2d 786 (2nd Cir. 1992), cert. denied, 113 S.Ct. 1065 (1993). In Markiewicz, the Second Circuit acknowledge that the Eighth and Ninth Circuits had applied general federal criminal statutes to offenses committed in Indian country by one Indian against another. Without passing on the validity of this approach, the court analyzed the language and history of 18 U.S.C. § 1163 and concluded that it specifically grants federal jurisdiction over offenses in Indian country. Id. at 800-801. The court found that Congress signaled its intent to confer jurisdiction by prohibiting the embezzlement of monies entrusted to an "officer" of "an Indian Tribal Organization." Id. This court agrees with the finding of the Second Circuit that 18 U.S.C. § 1163 specifically grants federal jurisdiction over embezzlement by Indians in Indian country. This court also concludes that 18 U.S.C. § 666 specifically grants jurisdiction over the acts of theft or bribery alleged in this

case. Section 666, like 18 U.S.C. § 1163, specifically covers acts committed by agents of "Indian tribal governments."

B. Public Law 280

Defendants argue that Congress waived subject matter jurisdiction over the offenses charged in this case through the enactment of Public Law 280 in 1953 (codified at 18 U.S.C. § 1162). The issue is treated at some length in the opinion of United States Magistrate Judge Raymond Erickson in an October 12, 1995 Report and Recommendation in the matter of United States v. Finn, File No. 5-95 crim. 12 (D.Minn. 1995). That opinion concludes that federal courts have jurisdiction over federal criminal statutes of general applicability, and Congress did not divest federal courts of this jurisdiction through the enactment of Public Law 280. We agree, and may confine our remarks to those which follow.

The law upon which Defendants rely reads in relevant part as follows:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over the offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
>
> * * *
>
> Minnesota .... All Indian country within the State, except the Red Lake Reservation.

* * *

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

18 U.S.C. §§ 1162(a) and (c); Public Law 280.

Defendants assert that the "plain language" of this statute divests federal courts of jurisdiction over the crimes alleged in the indictment. They do not articulate how the statute should be read to reach such a conclusion. We fail to see how any language in this law, let alone the "plain language," would cause such a result. Subdivision (a) of the law provides that Minnesota laws will be applied in Indian country to the same extent that the laws apply to offenses elsewhere in the state. In Indian country, as elsewhere in Minnesota, individuals are subject to state laws, and they are also subject to federal laws of general applicability. Subdivision (c) notes that the provisions of §§ 1152 and 1153 will not be applicable in Minnesota, since Minnesota will have exclusive jurisdiction over those crimes.

Public Law 280 was adopted in 1953. Defendants have cited no case which has dismissed an indictment or otherwise concluded that the federal courts lacked jurisdiction, upon the basis of this statute, and the Court has found none. The Court of Appeals for the Eighth Circuit has not directly ruled on the argument presented by Defendants, but in United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288 (7th Cir. 1974), the Seventh Circuit applied a federal criminal statute of general applicability (possession of a firearm in violation of 18 U.S.C. § 1202) to an Indian in a Public Law 280 state (Wisconsin). The court focused on treaty rights and found that no treaty precluded the application of the federal statute. Without analyzing the statute, the court

simply stated that "nothing in Public Law 280 or any other law" precludes application of the federal criminal laws to Menominee Indians. Id. at 1292.

C. Election Fraud Counts

Defendants contend that this Court lacks jurisdiction over the election fraud Counts alleged in the Indictment arguing there is no federal right to vote in a tribal election. Count 29 of the Indictment charges Defendants Rawley, Clark, Jasken, Pequette and Harper with conspiring to injure and oppress voters in the exercise of rights secured by the Constitution and laws of the United States and the Constitution and Bylaws of the Minnesota Chippewa Tribe in violation of 18 U.S.C. § 241. The Indictment alleges that the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. § 1301 et. seq., guarantees the right to cast votes in an election and to have them tabulated fairly and freely.

Section 241 of Title 18 makes it unlawful for two or more persons to "conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States ...." The issue presented by Defendants is whether the right to vote in a tribal election is a right or privilege secured by the Constitution or laws of the United States.

As quasi-sovereign entities pre-existing the Constitution, "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitation on federal or state authority." Santa Clara Pueblo v. Martinez, 436 U.S. 32, 55-56 (1978). The Supreme Court and lower federal courts have held that the provisions of the Constitution, including the Due Process Clause of the Fourteenth Amendment, do not operate upon the powers of self government enjoyed by Indian tribes. Id. citing Talton v.

Mayes, 163 U.S. 376, 384 (1896); See also Runs After v. United States, 766 F.2d 347, 353 (8th Cir. 1985). Because the Equal Protection Clause does not directly apply to tribal elections, the application of 18 U.S.C. § 241 in this case cannot be based on rights secured by this Clause of the United States Constitution. Nor can the court apply section 241 based on the Constitution of the Minnesota Chippewa Tribe because it is not a law of the United States as required by section 241.

The right to vote in a tribal election is among the rights secured by the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 et seq., a law of the United States. The ICRA states that "No Indian tribe in exercising powers of self government shall * * * deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8). In a series of cases during the mid-1970's, the Eighth Circuit found that the equal protection clause of the ICRA guaranteed the right to vote in tribal elections. See Means v. Wilson, 522 F.2d 833, 838-839 (8th Cir. 1975) cert. denied, 424 U.S. 958 (1976); Daly v. United States, 483 F.2d 700, 704-05 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).

In Means v. Wilson, 522 F.2d at 838-39, the court stated, "Congress has guaranteed the right to vote in tribal elections against interference from Indian tribes by enactment of the Indian Civil Rights Act .... where Indian tribes have adopted Anglo-Saxon democratic processes for selection of tribal representatives, equal protection concepts applicable to the tribes by virtue of the Indian Civil Rights Act require[] adherence to the one man one vote principle as a necessary concomitant of the election process." (citations omitted).

In the present case, the Constitution of the Minnesota Chippewa Tribe adopts many of the Anglo-Saxon democratic processes embodied in the United States Constitution. Article

XIII of the Minnesota Chippewa Constitution states, '[a]ll members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities... and no member shall be denied any of the Constitutional rights or guarantees enjoyed by other citizens of the United States..." Under these circumstances, the equal protection clause of the ICRA, consistent with the Minnesota Chippewa Tribe's own constitution, guarantees the right to vote in a fair and honest election, a right enjoyed by all citizens of the United States.

Defendants argue that Means and White Eagle are no longer valid in light of the Supreme Court's decision in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). In Santa Clara, a female tribe member of the Santa Clara Pueblo brought a declaratory judgment action challenging the validity of a tribal ordinance which denied tribal membership to children of certain female tribe members, while granting membership to children of male tribe members. The Supreme Court found that the ICRA did not imply a private cause of action against tribal officers, and therefore, the court did not have jurisdiction to review the validity of a tribal ordinance. Id. at 70-72. In finding that there was no private cause of action under the ICRA, the Supreme Court noted that the only federal civil relief available under the ICRA is habeas corpus. Santa Clara, 436 U.S. at 66-67; See also Runs After v. United States, 766 F.2d 347, 353 (8th Cir. 1985). Based on Santa Clara Pueblo v. Martinez, Defendants argue that 18 U.S.C. § 241 does not apply because there is no federally guaranteed a right to vote in a tribal election under Indian Civil Rights Act.

This is not an action under the ICRA but a criminal prosecution under 18 U.S.C. § 241. Unlike Santa Clara, the issue here is not a question of authorizing a private right of action, which must be clearly expressed in a statute, but whether the ICRA, a law of the United States, secures the right to vote in tribal elections. The language of section 241

concerns rights, not remedies. Even though the only civil remedy under the ICRA is that of habeas corpus, it is clear that the ICRA guarantees rights similar to those guaranteed in the Bill of Rights. See Santa Clara, 436 U.S. at 72; Runs After, 766 F.2d at 353. Rights guaranteed by the ICRA are rights secured by federal law, whether or not the remedy is in federal court or in a tribal forum. It follows that a conspiracy to injure or oppress these rights is a federal offense under § 241.

Defendants argue that the Indictment does not allege an offense under section 241 because the right to vote in a tribal election is not a specific, federally enforceable right under the ICRA. See United States v. Bathgate, 246 U.S. 220, 226 (1918) (the right or privilege to be guarded in section 241 is "a definite, personal one, capable of enforcement by a court, and not the political, non-judicable one common to all that the public shall be protected against harmful acts").

The question of whether a right is personal and enforceable under § 241 does not depend on whether the right would support a private cause of action in federal court. See United States v. Wallace, 673 F.Supp. 205 (S.D. Texas 1987) (in a criminal action under 18 U.S.C. § 241, the United States was not required to prove actual deprivation of rights which would afford the victim with a private cause of action under 42 U.S.C. § 1983). The Supreme Court has construed section 241 broadly to include all rights or privileges secured by the Constitution or laws of the United States. See United States v. Guest, 383 U.S. 745, 753 (1966) (conspiracy to injure and oppress the right to travel freely from state to state is a federal offense under § 241). The right to an honest tabulation of votes is a right possessed by each voting elector. Anderson v. United States, 417 U.S. 211, 226 (1974). The intent to have false votes cast injures the right of all voters by diluting the influence of honest votes in the election. Id.

Section 241 applies to the Indian Civil Rights Act, a law of the United States. The right to vote in a fair and free tribal election is personal right secured by the equal protection provision of the ICRA, 25 U.S.C. § 1302(8). Criminal prosecution under § 241 does not depend on whether the ICRA authorizes a private civil cause of action in federal court. Accordingly, Count 29 of the Indictment states an offense under § 241 and should not be dismissed.

D. Infringement on Indian Rights and Policy

Defendant Wadena moved to dismiss Counts 1, 5, 7, 10-18, 19, 22 and 24 arguing that these Counts involve areas of specific Indian rights and policy over which the federal government has no jurisdiction. The Government did not submit a response to these motions.

With respect to Counts 1-18, Defendant argues the federal government is interfering with the manner in which the White Earth Reservation Tribal Council (WERTC) complies with Indian preference law, 25 U.S.C. § 450, 450(a). Sections 450 and 450a express Congress' general desire to facilitate an orderly transition from Federal domination of programs to and for Indians, to the meaningful participation by the Indian people in the planning, conduct and administration of such programs. Under 25 U.S.C. § 450e(b)(2), there is a preference to award to Indians any federal contracts that are with Indian Organizations for the benefit of Indians.

The Indictment is not in conflict with Indian preference laws. The allegations in Counts 1-18 are directed at bribery, embezzlement of funds and money laundering by specific individuals, not merely at the manner in which the Tribe awards its construction contracts. The Indictment specifically alleges that the casino contract was not legally awarded, and by implication, not consistent with Indian preference law.

This is not a case where a criminal statute conflicts with traditional rights reserved to the Indians by earlier treaties. See United States v. Blue, 722 F.2d 383, 385 (8th Cir. 1983); United States v. White, 508 F.2d 453 (8th Cir. 1974). The policies under 25 U.S.C. § 450 are federal statutory creations not treaty rights. The fact that the Indictment of individual tribe members has an indirect effect upon some aspects of federal Indian preference programs does not require dismissal of the Indictment.

Defendant argues that Counts 19, 22 and 24 of the Indictment interfere with the manner in which the White Earth Band of Chippewa manages its own hunting and fishing programs. Defendant cites United States v. White, 508 F.2d 453 (8th Cir. 1974), in which the Eighth Circuit found a general federal criminal statute (unlawful taking of a bald eagle in violation of 18 U.S.C. § 668) did not apply to an Indian hunting within the confines of the reservation. In that case, the court found that § 668 did not apply because it did not contain specific language to abrogate the treaty rights which entitled the defendant to hunt on the reservation.

In the present case, the allegations in Counts 19, 22 and 24 do not concern specific hunting or fishing rights, or regulation of such rights. The Indictment does not interfere with the manner in which fishing or hunting are conducted on the reservation, or allege that the policies of the White Earth Band of Chippewa should be displaced in favor of federal laws. Instead, the Indictment alleges that the White Earth fishing commission has nothing do to with fishing at all. It alleges that there was no legitimate purpose for the fishing commission, and that the persons responsible for fishing and hunting issues on the reservation were not even informed of the commission's existence. The Indictment charges particular individuals with embezzling funds for their personal use, and using payments from the commission as a method to avoid federal income taxes. Under these

circumstances Counts 19, 22 and 24 do not infringe on the hunting or fishing rights of the White Earth Band of Chippewa.

V. MOTIONS TO DISMISS

A. Motion to Dismiss Counts 1 and 19 by Defendant Wadena

Defendant Wadena moved to dismiss Counts 1 and 19 of the Indictment for failure to allege an offense. Defendant argues that the charges of conspiracy under 18 U.S.C. §371 are invalid because they are based on acts committed by the tribal council as a whole and a governmental body cannot conspire against itself. The Government did not respond to this motion.

In Runs After v. United States, 766 F.2d 347, 354 (8th Cir. 1985), the court found that a "Tribal Council as an entity or government body cannot conspire with itself." In that case, appellants brought a civil suit for conspiracy under 42 U.S.C. § 1985 alleging that members of the tribal council conspired to prevent their election by voting in favor of certain tribal resolutions. Id. at 353. The court held there could be no conspiracy because all the defendants were tribal council members acting in their official capacities by passing council resolutions. Id. at 354. The court stated:

> [T]here is no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his [or her] employment. *Herrmann v. Moore*, 576 F.2d 453, 459 (2nd Cir.) (action against law school and 38 individuals affiliated with the law school, including the dean and university trustees),

cert. denied, 439 U.S. 1003, 99 S.Ct. 613, 58 L.Ed.2d 679 (1978).

Runs After, 766 F.2d at 354.

In the present case, Defendants Wadena, Clark and Rawley are all members of the White Earth Tribal Council. Defendant Wadena argues that "all overt acts alleged to have been committed by Defendant and the alleged co-conspirators in Counts 1 and 19 are official actions taken, if at all, pursuant to Defendant's and the alleged co-conspirators' capacities as members of the White Earth Tribal Council." The Court does not agree. Counts 1 and 19 of the Indictment allege that Defendants acted for their personal gain and outside their duties as tribal council members. The alleged acts are not only acts of the council as a whole but of the individual Defendants, acting outside the scope and contrary to their duties as tribal council members.

Count 1 alleges that Rick Clark gave Darrell Wadena 50% of Northern Drywall and Construction company and that Wadena appointed Clark to serve as tribal representative for the casino project, without informing other tribe members of their agreements. It alleges that Rick Clark's company obtained the sub-contract for construction of the casino even though another company had submitted a substantially lower bid, and that Rick Clark attempted to a have after-the-fact inflated bid proposals prepared and placed in the bid proposal files. In addition, the Indictment alleges that on numerous occasions Clark paid substantial sums to Wadena and Rawley from the profits obtained by Northern Drywall. These alleged overt acts are not those of the tribal council as a whole but those of the particular Defendants charged in the conspiracy.

Count 19 presents a more difficult issue than Count 1 because formation of the fishing commission was an act of the entire council, not just Defendants. See¶ 65, 66, and 67 of the Indictment. However, this Count does allege that Defendants

Rawley, Clark and Wadena used the fishing commission to misapply funds for their own personal gain. It alleges specific instances in which Defendants used White Earth Reservation funds to purchase and make payments on personal items such as automobiles and recreational vehicles. Unlike the allegations against the tribal council in Runs After, the WERTC was not acting in concert against other members of the White Earth Tribe. Although formation of the fishing commission was an act of the whole council, the specific acts of misapplication of funds alleged against Defendants indicate that they were not acting for the council but for themselves. The conspiracy alleged in Count 19 was not a single act by the tribal council but individual acts by the Defendants acting for their own personal gain.

B. Motions to Dismiss Counts 4 and 28 by Defendant Rawley

1. Constitutionality of 18 U.S.C. § 1957

Defendant Rawley argues that the money laundering statute, 18 U.S.C. § 1957, is unconstitutionally vague because it lacks an intent requirement. Defendant argues that § 1957 is vague because the government is not required to prove that the accused knew the property was derived from "specified unlawful activity" as required by 18 U.S.C. §1956, but only that the property was "criminally derived."

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory law enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citations omitted). Because the statute does not raise issues of constitutionally protected conduct under the First Amendment, the court reviews that

statute as applied in this case. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-495 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others").

Under § 1957(a) a person who "knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a greater value than $10,000 and is derived from specified unlawful activity ..." is guilty of money laundering. The language of the statute makes it clear that knowledge of the nature of the property is an element of the crime. District courts in the Eighth Circuit have routinely imposed a knowledge requirement as reflected in the model jury instructions for 18 U.S.C. § 1957. See Manual of Model Criminal Jury Instructions for the Eighth Circuit, 6.18.1957 (Supp. 1994). Additionally, the Eleventh Circuit has upheld the constitutionality of §1957 against a void-for-vagueness challenge. See United States v. Baker, 19 F.3d 605, 614 (11th Cir. 1994). In that case, the court found that section 1957 requires the government to "prove that the defendant knew that the property was obtained from a criminal offense." Id.

In the present case, the Government must prove that the funds in Counts 4 and 28 derived from Defendants own allegedly criminal activities. Specifically, the Government has alleged that these funds were derived from the misapplication of funds in violation of 18 U.S.C. § 666. Considering the allegations in the Indictment, § 1957 is constitutional as applied in this case.

2. Multiplicity

Defendant Rawley also argues that Counts 4 and 28 of the Indictment should be dismissed on the grounds of multiplicity because they essentially charge the same offenses as Counts 3 and 27. Count 3 of the Indictment alleges that on

July 15, 1992 Jerry Rawley received a $15,000 bribe from Rick Clark in violation of 18 U.S.C. § 666(a)(1)(B). Count 4 alleges that on the same date, Jerry Rawley and Rick Clark engaged in money laundering through negotiation of the $15,000 Northern Drywall and Construction check, in violation of 18 U.S.C. § 1957. Count 27 alleges that on March 24, 1993, Jerry Rawley fraudulently obtained a $31,000 check owned by the White Earth Band of Chippewa Indians in violation of I 8 U.S.C. § 666. Count 28 alleges that on the same date, Jerry Rawley engaged in money laundering by negotiation of this $31,000 check in violation of § 1957.

"[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Defendant argues that § 666 does not contain any elements that § 1957 does not, "because one of the elements of section 1957 is the commission of the predicate crime under § 666 (or another specified criminal activity)."

Separate counts which rely on the same set of facts are not multiplicitous if Congress intended to allow punishments for both offenses. See United States v. Woodward, 469 U.S. 105 (1985). In Woodward, the defendant was charged with false statement count and a currency reporting violation based on the same facts (saying "no" when asked if he was carrying more than $5,000 into the country). The Supreme Court reversed the Ninth Circuit's finding, under Blockburger, that the defendant could not be punished for both violations. The Court found that Congress intended to allow punishment under both statutes, as shown by the fact that the statutes address "separate evils." 469 U.S. at 109.

The Eighth Circuit has held that "congress intended cumulative punishment for the specified unlawful activities and the money laundering violations." United States v. Morris, 18 F.3d 562, 569 (8th Cir. 1994); see also United

States v. Smith, 46 F.3d 1223, 1234 (1st Cir.), cert. denied, 116 S.Ct. 176 (1995); United States v. Skinner 946 F.3d 176, 178 (2nd Cir. 1991). Proof of a money laundering violation does not necessarily include proof of a § 666 offense, any specified criminal activity would be sufficient. The statutes are directed at "separate evils," § 666 is directed at bribery while § 1957 is directed at the disposal of criminal proceeds through the use of a financial institution. Charging both the money laundering violations and the underlying bribery offenses is not multiplicitous. See Smith, 46 F.3d at 1434 (holding that it was not multiplicitious to charge a defendant with the underlying offense in addition to the money laundering offense). Accordingly, Counts 4 and 28 of the Indictment should not be dismissed.

C. Pre-Accusatory Delay

Defendant Harper moved to dismiss the Indictment "due to preaccusatory delay" alleging that the government intentionally or recklessly delayed prosecution to gain a tactical advantage.

The right to prompt indictment is protected by the Due Process Clause and the applicable statute of limitations. United States v. Marion, 404 U.S. 307, 322, 324 (1971). The indictment must be dismissed if Harper demonstrates "that the pre-indictment delay in this case caused substantial prejudice to [his] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." Id. at 324; see also United States v. Stierwalt, 16 F.3d 282, 285 (8th Cir. 1994).

In the present case, Harper was indicted well within the five year statute of limitations. See 18 U.S.C. § 3282. Defendant Harper has not presented evidence or argument which would indicate that the delay in bringing the indictment was intentional device used to gain tactical advantage. Nor is

there any evidence that the delay has caused substantial prejudice to Harper's right to a fair trial. Accordingly, Harper's motion to dismiss should be denied.

D. Prosecutorial Misconduct and Vagueness

In Defendant Harper's Motion to Dismiss the Indictment for lack of subject matter jurisdiction [Docket No. 58], Defendant also moves for dismissal on the ground of prosecutorial misconduct before the Grand Jury. No evidence or argument was submitted in support of this allegation. There is nothing in the record which would indicate that prosecutorial misconduct occurred before the Grand Jury. Accordingly, the motion to dismiss on this ground should be denied.

Defendant Harper also argues that the statutes charged in the Indictment are "so vague in relation to this matter that persons of common understanding are not given fair notice on what conduct is criminal . . ." No memorandum of law was submitted in support of this argument. The Indictment charges Henry Harper with conspiracy to commit election fraud in violation of 18 U.S.C. §§ 241 and 371, mail fraud in violation of 18 U.S.C. § 1341 and false statement in violation of 18 U.S.C. § 1001. These statutes are not unconstitutionally vague as applied to the Indictment in this case. See United States v. Bohonus, 628 F.2d 1167 (9th Cir.) cert. denied, 447 U.S. 928 (1980) (applying 18 U.S.C. § 1341); United States v. Matanky, 482 F.2d 1319 (9th Cir.), cert. denied, 414 U.S. 1039 (1973) (applying 18 U.S.C. § 1001); United States v. McDermott, 29 F.3d 404 (8th Cir. 1994) (facial validity of 18 U.S.C. §§ 241 and 371 for a charge of conspiracy to violate civil rights).

E. Motion to Dismiss False Statement Charge

Defendant Pequette moved to dismiss Count 43 of the Indictment for failure to allege an offense. In Defendant's post hearing memorandum he argues that the false statement charge does not state an offense under the "exculpatory no" doctrine. See United States v. Taylor, 907 F.2d 801 (8th Cir. 1990).

The "exculpatory no" doctrine provides that "an individual who merely supplies a negative and exculpatory response to an investigators questions does not make a false statement in violation of section 1001." Taylor, 907 F.2d at 802. In that case, Felix Taylor was charge with two counts of making false statements under 18 U.S.C. § 1001 in which he denied knowledge of pleadings filed in a bankruptcy matter. In count I the bankruptcy judge asked, "Do you know who filed [the pleading] or signed it?" and Taylor responded, "I'm not aware of the pleading." In count II, the judge asked "Do you know who signed that pleading?" and Taylor responded, "No ma'am, I don't." Taylor, 907 F.2d at 802-03. The Eighth Circuit concluded that the statute was not intended to proscribe mere exculpatory denials of guilt and applied the "exculpatory no" doctrine.

In the present case, Count 43 of the Indictment alleges that Peter Pequette told "a Special Agent for the Department of the Interior that he had notarized absentee ballots only on persons in his presence for the June 14, 1995 tribal council election for the White Earth Band of Chippewa Indians, when in truth and in fact, defendant then and there knew that he had notarized numerous absentee ballots of voters who had not appeared in his presence and marked official absentee ballots, all in violation of Title 18, United States Code, Section 1001."

Rather than merely supplying a negative and exculpatory response, Count 43 alleges that Defendant Pequette made affirmative statements as to the propriety of his actions in

notarizing ballots. From the facts alleged in the Indictment, it appears that Defendant's statements were more than simple, exculpatory denials made in response to inquiries initiated by special agents of the Department of the Interior. See United States v. Capo, 791 F.2d 1054, 1069 (2nd Cir. 1986) (any statement more than a simple "no" does not fall within the exception). Accordingly, Count 43 of the Indictment sufficiently states an offense for violation of 18 U.S.C. § 1001.

IT IS HEREBY RECOMMENDED THAT:

1. The motions to suppress statements by Clark, Rawley, Pequette and Harper [Docket Nos. 61, 62, 159, 192 and 210] be denied;

2. The motion to suppress recorded statements by Defendant Clark [Docket No. 210] be denied;

3. The motions to suppress statements and evidence of electronic surveillance by Defendants Jasken and Wadena [Docket Nos. 81 and 128] be denied as moot;

4. The motions to suppress physical evidence by Defendants Harper, Wadena, Rawley and Pequette [Docket Nos. 62, 130, 159 and 193] be denied as moot;

5. The motion to suppress evidence obtained by Grand Jury Subpoena by Defendant Jasken [Docket No. 79] be denied;

6. The motions to sever the trial of Counts 1-28 of the Indictment from the trial of Counts 29-44 by

Defendants Wadena and Rawley [Docket Nos. 137 and 157] be granted;

7. The motion to sever counts and defendants by Defendant Pequette [Docket No. 188] be granted in so far as Counts 1-28 are severed from Counts 29-44 and denied in all other respects;

8. The motion for severance from all defendants by Defendant Jasken [Docket No. 86] be granted in so far as Counts 1-28 are severed from Counts 29-44 and denied in all other respects;

9. The motions to Dismiss the Indictment for lack of subject matter jurisdiction and failure to state an offense by Defendants Wadena, Rawley, Clark, Jasken, Harper and Pequette [Docket Nos. 58, 74-1, 93, 151, 153, 189 and 190] be denied;

10. The motions to Dismiss Counts 29-44 for lack of jurisdiction and failure to state an offense by Defendants Rawley, Clark, Jasken, Harper and Pequette [Docket Nos. 58, 74-1, 93, 153, 189 and 190] be denied;

11. The motions to Dismiss Counts 1, 5, 7, 10-18, 19, 22 and 24 for infringement on Indian rights and policy by Defendant Wadena [Docket Nos. 144 and 149] be denied;

12. The motion to Dismiss Counts 1 and 19 for failure to state an offense by Defendant Wadena [Docket No. 142] be denied;

13. The motions to Dismiss Counts 4 and 28 on grounds of vagueness and multiplicity by Defendant Rawley [Docket Nos. 155, 156] be denied;

14. The motion by Defendant Harper to Dismiss the Indictment for Pre-Accusatory delay (Docket No. 69] be denied;

15. The motion to dismiss for prosecutorial misconduct and vagueness by Defendant Harper [Docket No. 58] be denied;

16. The motion to dismiss Count 43, false statement count, for failure to allege an offense by Defendant Pequette [Docket No. 191] be denied.

Dated: January 24, 1995

/s/
JOHN M. MASON
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendations by filing with the Clerk of Court, and by serving upon all parties within ten days after service of a copy of this Report, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing within ten days after service of the Report and Recommendations.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

United States of America,

Plaintiff,

v.

ORDER
File No. 3-95-102

Darrell "Chip" Wadena
Jerry Rawley
Rick Clark
Peter Pequette, Jr.
Henry Harper
Carley Jasken

Defendants,

The above-entitled matter comes before the Court the parties' objections to the Report and Recommendation of the United States Magistrate Judge John M. Mason dated January 24, 1996.

Pursuant to statute, the Court has conducted a de novo review of the record. 28 U.S.C. § 636(b)(1); Local Rule 72.1(c). Based on that review, the Court makes the following:

Severance

In his Report and Recommendation, Magistrate Mason recommends severance of Counts 1-28 from Counts 29-44 of the Indictment. Count 1 of the Indictment charges Defendants

Wadena, Rawley and Clark with conspiracy to misapply tribal funds with respect to the Shooting Star Casino. Counts 2-18 allege specific acts of money laundering and misapplication of funds in connection with the Shooting Star conspiracy. Count 19 charges Defendants Wadena, Rawley and Clark with a conspiracy to misapply tribal funds with respect to a fishing commission. Counts 20-28 allege specific acts relating to the fishing commission conspiracy. Count 29 charge Defendants Rawley, Clark, Jasken, Pequette and Harper with conspiracy to injure and oppress voters in the exercise of rights and privileges in violation of 18 U.S.C. § 241. The object of the conspiracy was to secure the election of candidates supported by defendants, causing election judges to corruptly discharge their duties and cause ballots to be fraudulently cast. Counts 30-44 allege specific acts in relation to the election fraud conspiracy by defendants Rawley, Clark, Pequette, Harper and Jasken.

Magistrate Mason recommends severance because he believes there is no single, common purpose connecting the election fraud conspiracy to the casino and fishing commission conspiracies. On page 10 of the Report and Recommendation, Magistrate Mason states "[l]ogically, Defendant Wadena had an interest in helping his alleged coconspirators maintain their positions on the tribal council, and Defendants Jasken, Harper and Pequette had an interest in the profits from the alleged casino and fishing commission conspiracies. However, the Indictment does not clearly allege such a connection between the conspiracies and the Defendants." Magistrate Mason also stated that the involvement of Clark and Rawley in all conspiracies is insufficient to show one over-all agreement and justify joinder under Rule 8(b) citing United States v. Snider, 720 F.2d 985, 988 (8th Cir. 1984). Magistrate Mason did not rule on the issue of prejudice.

The decision to sever is within the sound discretion of the trial court, and denial of a motion to sever is not subject to reversal absent a showing of real prejudice. United States v. Jones, 880 F.2d 55 (8th Cir. 1988). Magistrate Mason correctly determined that the issue of joinder and severance must be analyzed under Rule 8(b) of the Rules of Criminal Procedure. Rule 8(b) provides for the joinder of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Courts have generally read "same series of acts or transactions" to mean "acts or transaction that are pursuant to a common plan or common scheme, which is to say (in the usual case) that the acts or transactions are part of a single conspiracy." United States v. Jones, 880 F.2d 55, 61 (8th Cir. 1989)(citation omitted). It is not necessary that every defendant have participated in or be charged with each offense. Jones, 880 F.2d at 62.

The government asserts that the indictment reveals a basis for joinder on its face. The government asserts that Wadena, Clark and Rawley were joined in multiple conspiracies allegedly to misapply funds for their personal use from the White Earth Tribal funds. In furtherance of that objective and in an effort to preserve that ability, defendants Clark and Rawley, with the assistance of others, caused the stuffing of ballots. The government asserts that Wadena was not named in the election conspiracy because he did not run for office during the principle period in which the violations occurred. The government asserts that there is sufficient facts to establish that the three conspiracies are "in the same series of acts or transactions constituting an offense or offenses" to render joinder under Rule 8(b) proper. The Court agrees that the Indictment does allege three conspiracies that a part of a series of acts or transactions and that joinder of the defendants under Rule 8(b) was proper.

Defendants also argue they will be prejudiced by the joinder of the offenses, because it would allow the introduction at trial of irrelevant evidence with respect to some of the conspiracies. For example, evidence related to the election fraud conspiracy is irrelevant to the conspiracies involving the casino or the fishing commission. While a joint trial may result in evidence being admitted against one defendant that would otherwise be irrelevant in the trial of a co-defendant, the Court finds that any prejudice that may result may be avoided through limiting instructions to the jury. Accordingly, this Court finds that severance of Counts 1-28 from 29-44 is not warranted in this case.

The Court has reviewed the remaining objections of the defendants and the submissions of the parties and ADOPTS the remaining portions of the Report and Recommendation (Clerk Doc. No. 228).

IT IS HEREBY ORDERED:

1. The motions to suppress statements by Defendants Clark, Rawley, Pequette and Harper [Docket Nos. 61, 62, 159, 192, and 210] are DENIED.
2. The motion to suppress recorded statements by Defendant Clark [Docket no. 210] is DENIED.
3. The motions to suppress statements and evidence of electronic surveillance by Defendant Jasken and Wadena [Docket Nos. 81 and 128] are DENIED as moot.
4. The motions to suppress physical evidence by Defendants Harper, Wadena, Rawley and Pequette [Docket Nos. 62, 130, 159 and 193] are DENIED as moot.
5. The motion to suppress evidence obtained by Grand Jury Subpoena by Defendant Jasken [Docket No. 79] is DENIED.
6. The motions to sever the trial of Counts 1-28 of the Indictment from the trial of Counts 29-44 by Defendants

Wadena and Rawley [Docket Nos. 137 and 157] are DENIED.

7. The motion to sever counts and defendants by Defendant Pequette [Docket No. 188] is DENIED.

8. The motion for severance from all defendants by Defendant Jasken [Docket No. 86] is DENIED.

9. The motions to dismiss the indictment for lack of subject matter jurisdiction and failure to state an offense by Defendants Wadena, Rawley, Clark, Jasken, Harper and Pequette [Docket Nos. 58, 74-1, 93, 151, 153, 189 and 190] are DENIED.

10. The motions to dismiss Counts 29-44 for lack of jurisdiction and failure to state an offense by Defendants Rawley, Clark, Jasken, Harper and Pequette [Docket Nos. 58, 741, 93, 153, 189 and 190] are DENIED.

11. The motions to dismiss Counts 1, 5, 7, 10-18, 19, 22, and 24 for infringement on Indian rights and policy by Defendant Wadena [Docket Nos. 144 and 149] are DENIED.

12. The motion to dismiss Counts 1 and 19 for failure to state an offense by Defendant Wadena [Docket No. 142] is DENIED.

13. The motions to Dismiss Counts 4 and 28 on grounds of vagueness and multiplicity by Defendant Rawley [Docket Nos. 155 and 156] are DENIED.

14. The motion by Defendant Harper to dismiss the indictment for preaccusatory delay [Docket No. 69] is DENIED.

15. The motion to dismiss for prosecutorial misconduct and vagueness by Defendant Harper [Docket No. 58] is DENIED.

16. The motion to dismiss Count 43, false statement count, for failure to allege an offense by Defendant Pequette [Docket No. 191] is DENIED.

Date: 4-11-96

/s/

Michael J. Davis
United States District Court

AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Third Division - District of Minnesota

UNITED STATES OF AMERICA

v. Case Number CR 3-95-102(3)

RICKIE LEE CLARK

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, RICKIE LEE CLARK, was represented by Peter Mayrand.

The defendant has been found not guilty on count(s) 30 and is discharged as to such count(s).

The defendant was found guilty on count(s) 1, 2, 4, 6, 8-19, 21, 25, 29, 32-34 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Conspiracy	March 1994	1
18 USC 666(a)(2)	Theft or Bribery Concerning Programs Receiving Federal Funding	December 1993	2, 6, 8
18 USC 1957 and 2	Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	December 1993	4, 10, 11-18
18 USC 1341 and 2	Mail Fraud	June 10, 1994	9, 32-34
18 USC 1163	Willful Misapplication of Tribal Funds	March 1994	19, 21, 25
18 USC 241	Conspiracy to Oppress Free Exercise of Election Rights	September 30, 1994	29

As imposed on November 21, 1996, the defendant is sentenced as provided in pages 3 through 7 of this Judgment.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 1,100.00, for count(s) 1, 2, 4, 6, 8-19, 21, 25, 29, 32-34, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Dated: November 26, 1996

/s/
MICHAEL J. DAVIS, Judge
United States District Court

Defendant's Soc. Sec. No: 470-54-9986
Defendant's Date of Birth: 08/24/48
Defendant's address: Rural Route 1, Box 1345, Lengby, MN 56651

Defendant: RICKIE LEE CLARK
Case Number: CR 3-95-102 (3)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **46 MONTHS** under each of counts 1, 2, 4, 6, 8-19, 21, 25, 29, 32-34, to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be housed in a facility in the state of Minnesota, preferably at Duluth, Minnesota.

The defendant shall surrender for service of sentence to the institution designated on or before December 5, 1996, before 2:00 P.M., as notified by Pretrial Services/U.S. Probation Office. If no facility has been designated by that date, the defendant is to report to the office of the U.S. Marshal in St. Paul, Minnesota by 12:00 noon on December 5, 1996.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____ with a certified copy of this Judgment.

CERTIFIED ORIGINAL AND TRUE COPY IN 7 PAGES.

UNITED STATES MARSHAL

DATED: November 26, 1996

By_____
Deputy Marshal

BY: _____
DEPUTY CLERK

Defendant RICKIE LEE CLARK
Case Number: CR 3-95-102 (3)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 YEARS.**

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm or destructive device.
4. The defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without the approval of the probation officer.
5. Because the instant offense is not drug-related and the defendant does not have a history of drug-abuse, the defendant is not required to undergo mandatory drug testing as set forth by 18 USC Sections 3563(a) and 3583(d).

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: RICKIE LEE CLARK
Case Number: CR 3-95-102 (3)

FINE

The defendant shall pay a fine of $ 10,000.00.

This fine (plus any interest required) shall be paid in full immediately.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: RICKIE LEE CLARK
Case Number: CR 3-95-102 (3)

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
White Earth Reservation Tribal Council P.O. Box 418 White Earth, MN 56591	$147,499.00

Payments of restitution are to be made to the Clerk of U.S. District Court for transfer to the payees.

Restitution shall be paid in full immediately.

Defendant: RICKIE LEE CLARK
Case Number: CR 3-95-102 (3)

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except as noted in the Statement of Reasons For Imposing Sentence, dated November 26, 1996, filed separately.

Guideline Range Determined by the Court:

Total Offense Level:	22
Criminal History Category:	I
Imprisonment Range:	41 months to 51 months
Supervised Release Range:	2 to 3 years
Fine Range:	$ 7,500 to $ 75,000

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-4146MNST

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
vs.	*	District Court for the
	*	District of Minnesota
Rick Clark,	*	
	*	
Appellant.	*	

JUDGMENT

The judgment filed June 10, 1998, is hereby vacated.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part and remanded to the district court with directions for further proceedings in accordance with the opinion of this Court.

August 11, 1998

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-4141

United States of America,	*	
	*	AMENDED OPINION
Appellee,	*	
	*	Appeals from the United States
v.	*	District Court for the District
	*	of Minnesota.
Darrell Chip Wadena,	*	
	*	
Appellant.	*	

No. 96-4145

United States of America,	*	
	*	
Appellee,	*	
	*	
v.	*	
	*	
Jerry Joseph Rawley, Jr.,	*	
	*	
Appellant.	*	

96-4146

United States of America, *
*
Appellee, *
*
v. *
*
Rick Clark, *
*
Appellant. *

Submitted: October 20, 1997
Filed: August 11, 1998

Before McMILLIAN, LAY, and BEAM, Circuit Judges.

LAY, Circuit Judge.

In June 1996, Rickie Lee Clark, Jerry Joseph Rawley, Jr., and Darrell "Chip" Wadena were convicted in federal district court of conspiracy, in violation of 18 U.S.C. § 371, theft or bribery concerning programs receiving federal funds, in violation of 18 U.S.C. § 666, engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. §§ 1957 and 2, and willful misapplication of tribal funds, in violation of 18 U.S.C. § 1163. In addition, Clark and Rawley were convicted of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, and conspiracy to oppress free exercise of election rights, in violation of 18 U.S.C. § 241.[1]

---

[1] Wadena received a sentence of 51 months in prison, Clark received a sentence of 46 months in prison, and Rawley received a sentence of 37

Clark, Rawley, and Wadena appeal their convictions. On appeal, they jointly and severally challenge the federal court's jurisdiction to prosecute the charges against them. They also raise several trial and procedural errors. For the reasons discussed below, we affirm all judgments of conviction.

I. Background

The 880,000-acre White Earth Reservation ("Reservation") is located in northwest Minnesota. The Reservation is home to the White Earth Band ("Band"), one of the six constituent bands of the Minnesota Chippewa Tribe. The Band consists of 22,000 members. Approximately 3,800 of the Band's enrolled members live on the Reservation, and the remaining members live throughout the United States. The Reservation Tribal Council ("RTC") (formerly known as the Reservation Business Committee) governs all aspects of the Band, including its economic activity.[2]

The RTC consists of five members who serve four-year terms. The Band elects the members by general elections held every two years. To be eligible for election, a candidate must be an enrolled member who resides on the Reservation. During the time frame relevant to this case, Clark, Rawley, and Wadena all served on the RTC. Wadena served as Chairman, Rawley served as Treasurer, and Clark served as Councilman.

The offenses for which Clark and Rawley were convicted arose from three conspiracies: 1) the construction conspiracy;

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months in prison. Each defendant was also ordered to pay restitution, fines, and a special assessment.

[2] For example, in the time period relevant to this case, the RTC controlled the distribution of assistance funds for Band members, made housing loans to various members, and conducted economic development projects.

2) the commissions conspiracy; and 3) the election conspiracy. Wadena's convictions arose solely from the construction conspiracy and the commissions conspiracy. We detail these conspiracies below.

A. The Construction Conspiracy

In 1985, Congress enacted the White Earth Reservation Land Settlement Act ("WERLSA"). 25 U.S.C. § 331. The purpose of the WERLSA was to settle numerous claims involving large portions of land on the Reservation. Id. As part of the Act, the United States appropriated $6.6 million "for economic development for the benefit of the White Earth Band of Chippewa Indians." Id. In 1991, the RTC authorized the use of approximately $5 million of this money for construction of a casino on the Reservation called the Shooting Star Casino ("Casino"). The Casino project involved approximately $24 million.

The RTC appointed Clark to oversee construction of the Casino.[3] The RTC also hired Indian-owned Gordon Construction, Inc. ("Gordon") to act as general contractor for the project. Gordon subcontracted with Northern Drywall and Construction, Inc. ("Northern") for installation of drywall and various painting services. Northern did not submit a formal bid for the subcontract. Prior to the subcontract in question, Northern had only worked on small construction projects, and in the years prior to the Casino project, Northern's gross revenues never exceeded $50,000. Clark owned Northern, and he served as its president.

Construction of the Casino began in mid-1991 and was complete within one year. The Casino was quite successful; it

[3] Initially, the RTC appointed Jim Foster, the Band's Executive Director, to oversee the Casino construction on behalf of the RTC. Clark eventually replaced Foster.

created more than 1000 jobs and generated millions of dollars in revenue. In 1993, for example, the Band grossed $50 million, a majority of which came from the operation of the Casino. The RTC had control over the Band's spending of all non-federal revenue such as the revenue from the Casino.

In 1993, the civil examination unit of the Internal Revenue Service ("IRS") conducted an audit of Northern. During the audit, examiner Greg Nygren discovered Northern had made payments to Wadena totaling over $428,000. Northern made the first payment to Wadena in July 1991, about four months before the drywall subcontract was publicized. In response to inquiries about the payments, Clark and Wadena claimed Wadena held an undisclosed ownership interest in Northern, and the payments represented Wadena's share of profits from Northern. However, Wadena never mentioned this alleged ownership interest on his 1990 financial statements or on loan applications he submitted in 1990. Further, Northern's accountant did not know of Wadena's alleged interest. Later, Clark falsified and backdated Northern's corporate minutes and stock certificates in an attempt to document Wadena's ownership interest in the company.

In 1992, Northern also made a payment to Rawley in the amount of $15,000. Clark and Rawley claimed the payment was for consulting services. In reality, Northern made the payment to Rawley to secure Rawley's silence about Northern's payments to Wadena, who was Rawley's long-time political rival.

The government indicted Clark, Rawley, and Wadena on August 29, 1995. The Indictment charged defendants with eighteen counts arising from the construction of the Casino. Count 1 alleged that all three defendants conspired to misapply tribal funds, in violation of 18 U.S.C. §§ 371, 666, and 1163. The object of the conspiracy was to use tribal funds for personal gain in the construction of the Casino.

Counts 2 through 18 alleged the defendants engaged in various acts of money laundering and misapplication of funds in furtherance of the conspiracy.[4] The jury convicted Clark, Rawley, and Wadena of all counts related to the construction conspiracy.

B. The Commissions Conspiracy

The RTC members created two commissions of which they were the sole members: the Gaming Control Commission and the Fishing Commission ("Commissions"). The RTC members assumed no additional duties by serving on the Commissions, and the Commissions themselves were essentially functionless.[5] Nonetheless, Clark, Rawley, and Wadena received substantial payments for their service on the Commissions.[6] At irregular intervals, and when the desire

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[4] Count 2 charged Clark with making the $15,000 payment to Rawley, in violation of 18 U.S.C. § 666(a)(2). Count 3 charged Rawley with accepting that payment, in violation of 18 U.S.C. § 666(a)(1)(B). Count 4 charged Clark and Rawley with money laundering and acting as principals for money laundering, in violation of 18 U.S.C. §§ 1957 and 2. Count 5 charged Wadena with accepting stock from Northern, in violation of 18 U.S.C. § 666(a)(1)(B). Count 6 charged Clark with giving Wadena Northern stock, in violation of 18 U.S.C. § 666(a)(2). Count 7 charged Wadena with accepting $428,682.50 in payments from Clark, in violation of 18 U.S.C. § 666(a)(1)(B). Count 8 charged Clark with giving Wadena $428,682.50 in payments, in violation of 18 U.S.C. § 666(a)(2). Count 9 charged Clark with using the mail to procure phony bids for the Casino, in violation of 18 U.S.C. § 1341. Counts 10 through 18 charged Wadena and Clark with money laundering and acting as principals for money laundering, in violation of 18 U.S.C. §§ 1957 and 2.

[5] Wadena states "the purpose for creating a fishing commission was to formalize the new tax exemption for income generated in relation to fishing-treaty rights." See Wadena Br. at 5. The payments Clark, Rawley, and Wadena received from the Fishing Commission were tax exempt.

[6] These payments were in addition to the salaries Clark, Rawley, and Wadena received for service on the RTC. In 1993, Wadena's RTC salary

arose, Clark, Rawley, and Wadena directed the issuance of tribal funds to themselves, and they directed the Band's accounting department to code the checks as payment for commission meetings. These payments were made from the Band's general treasury, and when combined with Clark's, Rawley's and Wadena's RTC salaries for the years 1990 to 1993, the payments amounted to over $1.2 million.

In the 1995 Indictment, the government charged Clark, Rawley, and Wadena with ten counts arising from the Commissions conspiracy. Count 19 alleged the defendants conspired to misapply tribal funds, in violation of 18 U.S.C. §§ 371 and 1163. The object of this conspiracy was to obtain tribal funds in the form of excessive commission payments. Counts 20 through 28 alleged various acts of misapplication of tribal funds, theft or bribery concerning programs receiving federal funds, and money laundering.[7] The jury convicted Clark and Wadena of all counts relating to the Commissions conspiracy. The jury convicted Rawley of all counts except for one count of misapplying tribal funds.

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was $144,000, Clark's RTC salary was $122,000 and Rawley's RTC salary was $102,000. The government did not allege or charge that these salaries constituted a misappropriation of tribal funds.

[7] Count 20 charged Rawley with misapplying tribal funds for the purchase of an all-terrain vehicle and a snow plow, in violation of 18 U.S.C. § 1163. Count 21 charged Clark with misapplying tribal funds for the purchase of a snowmobile, in violation of 18 U.S.C. § 1163. Count 22 charged Wadena with misapplying tribal funds for a payment on a car loan, in violation of 18 U.S.C. § 1163. Count 23 charged Rawley with misapplying $25,000 of tribal funds, in violation of 18 U.S.C. § 1163. Count 24 charged Wadena with misapplying $56,705 of tribal funds, in violation of 18 U.S.C. § 1163. Count 25 charged Clark with misapplying $54,500 of tribal funds, in violation of 18 U.S.C. § 1163. Count 26 charged Rawley with misapplying $3 1,000 of tribal funds, in violation of 18 U.S.C. § 1163. Count 27 charged Rawley with obtaining tribal funds by fraud and intentionally misapplying those funds, in violation of 18 U.S.C. § 666. Count 28 charged Rawley with money laundering, in violation of 18 U.S.C. § 1957.

C. The Election Conspiracy

In addition to the convictions set forth above, Rawley and Clark were also found guilty under 18 U.S.C. § 241 for conspiracy to oppress free exercise of tribal election rights. As noted above, the RTC members are elected every two years. Because most of the Band's members do not live on the Reservation, the majority of members vote by absentee ballot. The Minnesota Chippewa Tribe prescribes absentee ballot voting procedures for its constituent tribes. During the time frame relevant to this case, these procedures provided that a person who wished to vote by absentee ballot would first request a ballot from the Band's authorities. The voter would then complete the ballot and place it in an envelope upon which was printed an affidavit the voter signed and had notarized. The voter would then send the ballot directly to election headquarters where it would be tallied. During the 1994 election, numerous absentee ballots were fabricated and falsely notarized. Both Clark and Rawley had a hand in improperly notarizing absentee ballots, and Clark himself forged numerous ballots. The government emphasizes that Clark and Rawley used the United States mail as well as notaries licensed by the State of Minnesota to perpetuate the absentee ballot fraud.

In the 1995 Indictment, the government charged Clark and Rawley with sixteen counts relating to the election conspiracy. The government did not charge Wadena with any counts relating to the election conspiracy. Count 29 alleged that Clark and Rawley conspired to injure and oppress voters, in violation of 18 U.S.C. § 241.[8] Section 241 makes it unlawful for

[8] Count 29 also named tribal election judge Carley Jasken, notary Peter Pequette, Jr., and notary Henry Harper. The jury acquitted Jasken of all charges. Pequette cooperated with and testified on behalf of the

> two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person in any State [or] Territory ... in the free exercise or enjoyment of any right or privilege secured to him [or her] by the Constitution or laws of the United States, or because of his [or her] having so exercised the same....

The object of this conspiracy was to procure the election of certain candidates to tribal positions by causing election officials to corruptly discharge their duties and by causing fraudulent ballots to be cast. Counts 30 through 44 alleged various acts of misapplication of funds, mail fraud, false statements, and obstruction of justice.[9] The jury convicted Rawley of all counts relating to the election conspiracy. The jury convicted Clark of all counts relating to the election conspiracy except for one count of using tribal funds to pay people to assist him and others in gaining re-election.

II. Overall Jurisdiction

Each defendant challenges his convictions on various grounds. First, we address the defendants' overall challenge of the federal court's jurisdiction to prosecute them for the charged offenses. The defendants make two basic challenges:

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government. Harper pleaded guilty to making a false writing, in violation of 18 U.S.C. § 1001.

[9] Count 30 charged Clark with using tribal funds to pay people to assist him and others in gaining re-election, in violation of 18 U.S.C. § 1163. Count 31 charged Rawley with using tribal funds to pay people to assist him in gaining re-election, in violation of 18 U.S.C. § 1163. Counts 32 to 41 charged Clark and Rawley with using the mails to defraud voters, and acting as principals in that mail fraud, in violation of 18 U.S.C. §§ 1341 and 2. Counts 42 to 44 charged Harper, Pequette, and Jasken with various violations.

(1) the only federal law applicable to the defendants, as Native Americans, are those encompassed within the Indian Country Crimes Act, 18 U.S.C. § 1152, and the Indian Major Crimes Act, 18 U.S.C. § 1153; (2) alternatively, the defendants urge, even if general federal criminal laws do apply to them, Public Law 280 (codified at 18 U.S.C. § 1162) granted Minnesota state courts exclusive jurisdiction over crimes involving Indians and arising in Indian country.

The defendants' first jurisdictional challenge is broad-based and if true, would require this court to dismiss all charges. This particular jurisdictional claim is allegedly derived from historic interpretation of the "patchwork" of federal statutes and early case law affecting the sovereignty of Indian tribes in America. This area of the law is not easily discerned and has arisen in numerous cases both in this court and other circuit courts of appeal.[10]

The general laws of the United States were made applicable to Indian Country through the Indian Country Crimes Act, 18 U.S.C. § 1152.[11] The second paragraph of the

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[10] See, e.g., United States v. Smith, 562 F.2d 453, 455-58 (7th Cir. 1977);. United States v. Begay, 42 F.3d 486, 497-500 (9th Cir. 1994); United States v. Markiewicz, 978 F.2d 786, 797-803 (2d Cir. 1992); United States v. Blue, 722 F.2d 383, 384-86 (8th Cir. 1983).

[11] Section 1152 provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Act contains an exception to this jurisdictional grant for any crime committed by one Indian against another. As early as 1883, the Supreme Court in Ex Parte Crow Dog, 109 U.S. 556 (1883), applied this exception and dismissed a federal prosecution for murder of one Indian by another. In 1885, in order to curb a perceived lawlessness resulting from the Crow Dog decision, Congress passed the Indian Major Crimes Act, 18 U.S.C. § 1153, which provides the federal courts with exclusive jurisdiction over certain enumerated crimes.[12]

The Indian Major Crimes Act allowed for federal prosecution of certain enumerated crimes, and today, the

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This Act is sometimes referred to as the General Crimes Act. See United States v. Wheeler, 435 U.S. 313, 324 (1978).

[12] Section 1153 provides:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

As will be discussed infra, jurisdiction over the crimes enumerated in the Indian Major Crimes Act has now been delegated to certain states pursuant to Public Law 280.

federal government has jurisdiction over fourteen major crimes when they are committed on an Indian reservation. The Indian Major Crimes Act does not contain an Indian-against-Indian exception. Nonetheless, the defendants argue that as a result of the Indian Major Crimes Act, the federal government no longer has jurisdiction under § 1152 to prosecute crimes perpetrated by one Indian against another, unless the crime is one enumerated in § 1153.[13] In support of this argument, the defendants cite United States v. Quiver, 241 U.S. 602 (1916), wherein the Supreme Court observed that the inclusion of certain offenses within the Indian Major Crimes Act "carries with it some implication of a purpose to exclude others." 241 U.S. at 606.

In sum, the defendants argue that the only crimes which may be the basis for federal court jurisdiction are those within the Indian Country Crimes Act and the Indian Major Crimes Act. As the defendants acknowledge, this court has rejected this claim on several occasions. See, e.g., Blue, 722 F.2d at 384-86; Stone v. United States, 506 F.2d 561, 563 (8th Cir. 1974); United States v. White, 508 F.2d 453, 454-55 (8th Cir. 1974). We recognize that when addressing claims like the one made here, our court and other courts of appeal have issued opinions that seem confusing and somewhat inconsistent.[14] However, there are several reasons why we believe our earlier precedent controls.

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[13] Although not relevant here, such argument must acknowledge that in states not covered by Public Law 280, the federal government could still prosecute Native Americans under the Assimilative Crimes Act, 18 U.S.C. § 13, by utilizing state law where no comparable federal law exists. Cf. United States v. Butler, 541 F.2d 730 (8th Cir. 1976). However, under the Assimilative Crimes Act, the exception involving Indian-against-Indian crimes would still apply. See, e.g., United States v. Thunder Hawk, 127 F.3d 705, 706-08 (8th Cir. 1997).

[14] For example, in Blue, our court stated "§ 1152 and its exceptions do not extend or restrict the application of general federal criminal statutes to Indian reservations." 722 F.2d at 384. See also Stone, 506 F.2d at 563-

First, many courts of appeal[15] recognize that federal courts may enforce general federal criminal laws against all persons, including Indians within Indian country.[16] Federal statutes of general applicability, those in which situs of the offense is not an element of the crime, are not encompassed within the Indian Country Crimes Act. As a result, the Indian-against-Indian exception contained in the Indian

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64; White, 508 F.2d at 454-55. This interpretation has also been made in numerous Ninth Circuit cases, most recently in Begay, 42 F.3d at 498 (Sections 1152 and 1153 "deal[] only with the application of federal enclave law to Indians and [have] no bearing on federal laws of nationwide applicability that make actions criminal wherever committed.").

In contrast, the Fourth Circuit, in United States v. Welch, 822 F.2d 460, 464 (4th Cir. 1987), reversed a conviction under the Assimilative Crimes Act, holding that "[w]hen there is a crime by an Indian against another Indian within Indian country only those offenses enumerated in the Major Crimes Act may be tried in the federal courts." In Markiewicz, the Second Circuit cited this decision with approval, stating that this "alternative approach ... is more deferential to the Supreme Court's determination in Quiver that congress's inclusion of certain crimes in the major crimes act 'carries with it some implication of a purpose to exclude other[]' crimes." 978 F.2d at 799, (quoting Quiver, 241 U.S. at 606).

[15] See United States v. Stone, 112 F.3d 971, 973 (8th Cir. 1997); Blue, 722 F.2d at 384; Stone, 506 F.2d at 563-64; White, 508 F.2d at 454-55; see also United States v. Yannott, 42 F.3d 999, 1003-04 (6th Cir. 1994); Begay, 42 F.3d at 498; United States v. Young, 936 F.2d 1050, 1055 (9th Cir. 1991); United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1975).

[16] See Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law 283 (Rennard Strickland et al. eds., 1982) ("Where retained tribal sovereignty in Indian country is not invaded and no other particular Indian right is infringed, individual Indians and their property are normally subject to the same federal laws as other persons."); Wheeler, 435 U.S. at 330 n.30 ("Federal jurisdiction also extends to crimes committed by an Indian against a non-Indian which have not been punished in tribal court ... and to crimes over which there is federal jurisdiction regardless of whether an Indian is involved, such as assaulting a federal officer.")

Country Crimes Act does not apply to federal criminal laws of general applicability.

The Second Circuit in Markiewicz, 978 F.2d 786, and the Seventh Circuit in Smith, 562 F.2d 453, emphasized that only federal laws which seek to protect a "peculiar" federal interest may be prosecuted.[17] For example, in Smith, the offense was charged under 18 U.S.C. § 111 for forcible assault on a federal officer. The Smith court found that the district court had concurrent jurisdiction with the tribal court, because of the "peculiarly Federal nature" of the assault. 562 F.2d at 458. However, this distinction actually is difficult to apply, given the presumption of jurisdictional authority of Congress to pass federal laws. If Congress passes any federal act, assuming it has constitutional authority to do so, there always exists a federal concern and interest. For this reason, identifying a federal interest in a general federal law in order to override tribal sovereignty seemingly is redundant.

At the time that the Indian Country Crimes Act was passed, it may have been assumed, as Felix Cohen points out, that federal laws outside of enclave laws were not applicable to the Indian Country. See Cohen, supra, at 296-97. However, as Indian law evolved, that premise was discarded. General federal criminal laws directed to all persons became recognized as applying equally to Native Americans within Indian Country. See Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116-17 (1960); Cohen, supra, at 284-85.

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[17] Those courts reasoned that deference to tribal authority and sovereignty should allow tribal laws to deal with relations among the members of the tribe. Cf. Quiver, 241 U.S. at 603-04 (It is settled policy of Congress "to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws.").

Moreover, the Indian Country Crimes Act speaks only to the "general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States. . . . " 18 U.S.C. § 1152 (emphasis added). Because situs of the offense is not an element of any of the statutory violations committed by the defendants, none of the defendants claim the crimes for which they were convicted were enclave laws. Thus, because the offenses do not fall within the Indian Country Crimes Act, they are not subject to the Act's exception relating to crimes committed in Indian Country by one Indian against another.[18]

The Indian-against-Indian exception contained in the Indian Country Crimes Act manifested, as Cohen observes, "a broad respect for tribal sovereignty, particularly in matters affecting only Indians." Cohen, supra, at 290 (citing Quiver, 241 U.S. 602, and Crow Dog, 109 U.S. 556). However, the application of general federal laws to Native Americans in

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[18] Defendants rely upon Quiver, 241 U.S. 602, as authority to exempt prosecution on the theory that all of the offenses charged fall within the exclusive jurisdiction of the tribe's sovereignty because they relate to internal relations of the members of the tribe. The defendants urge that Quiver applied the exception under the Indian Country Crimes Act to a general federal law of adultery. Our research is to the contrary. The adultery statute applied was derived from the Act of March 3, 1887, ch. 397, 24 Stat. 635, which was directed toward the Territory of Utah. The law was later codified under "Certain Offenses in the Territories," ch. 13, § 316, 7 Fed. Stat. 968 (1916). Section 311 of the chapter states:

> [Places within which sections of this chapter shall apply.] Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States.

In other words, § 316 was an enclave statute, applying only to federally controlled territory. Clearly Congress would have no authority to pass a general law, such as one prohibiting adultery, outside a federal enclave.

this case does not implicate the tribal concerns of sovereignty addressed by the Indian Country Crimes Act exception. There may be other federal-law prosecutions that would implicate important tribal interests. However, we fail to see how tribal interests are paramount to the federal interests implicated in the various criminal charges involved here. Although the defendants are Native Americans, and their conduct took place within Indian country, tribal interests do not outweigh the federal interest in prohibiting offenses such as mail fraud, money laundering, bribery, and conspiracy. Moreover, Indian tribes are not totally independent of the United States. Federal jurisdiction over the offenses committed here is imperative for the protection of all Native Americans who are U.S. citizens living on Indian reservations.

Public Law 280

The alternative Jurisdictional argument raised by the defendants may be summarily rejected. Defendants assert that even if general federal laws are applicable, under Public Law 280, the federal government has surrendered to the State of Minnesota its criminal jurisdiction over all federal offenses committed on Indian lands. As the defendants acknowledge, this court has rejected this exact argument in two recent cases: Stone, 112 F.3d 971, and United States v. Pemberton, 121 F.3d 1157 (8th Cir. 1997), cert. denied, __ U.S. __, 118 S.Ct. 1046 (1998). As this court observed in Pemberton: "Crimes of general applicability—that is, actions that Congress has declared illegal regardless of where they occur—are not affected by the enactment of Public Law 280 and remain within the subject-matter jurisdiction of the federal courts." 121 F.3d at 1164.

III. Jurisdictional Challenge to the Election Conspiracy

Clark and Rawley do not challenge the sufficiency of the evidence to sustain their convictions relating to the election fraud, and the evidence of their guilt is overwhelming. However, both Clark and Rawley vigorously assert that the exercise of federal criminal jurisdiction over the conspiracy to commit election fraud is not authorized by Congress and seriously impinges upon tribal sovereignty. As such, they urge the election was within the exclusive jurisdiction of the Tribal Court. They conclude that under the principles enumerated in Quiver and Crow Dog, federal courts lack jurisdiction over matters such as tribal elections that relate to the internal affairs of the tribe.

The district court held that the conspiracy law under § 241 is a law of general applicability because the situs of the offense—in this case, voter fraud—is in no way an element of the crime. In other words, the district court's rationale was that Congress has declared any conspiracy which violates federally protected rights a crime regardless of where the offense occurs. And, as we have previously discussed, laws of general applicability "apply" with equal force when committed by a Native American on a reservation. See Part II, supra.

Clark and Rawley also challenge federal jurisdiction on the ground that the tribe exists as an independent nation over which the federal government has no jurisdiction concerning a local tribal election. There is no question that Indian tribes are quasi-sovereigns and enjoy rights and privileges of self-government and local culture. However, the Supreme Court observed early on in Talton v. Mayes that while Indian Nations are "possessed of... attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States." 163 U.S. 376, 384 (1896) (citing Cherokee

Nation v. Southern Kansas Ry. Co., 135 U.S. 641 (1890)). In this regard, tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." Wheeler, 435 U.S. at 323. The Supreme Court emphasized the dominance of congressional authority over Indian tribes in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), observing: "As the Court in Talton recognized ... Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." 436 U.S. at 56 (also citing United States v. Kagama, 118 U.S. 375, 379-81, 383-84 (1886); Cherokee Nation v. Hitchcock, 187 U.S. 294, 305-07 (1902)). The Santa Clara court went on to emphasize that the passage of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03[19] ("ICRA"), serves as an example of that authority. The Court summed up this legislation by observing: "In 25 U.S.C. § 1302, Congress acted to modify the effect of Talton and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment."[20] 436 U.S. at 57.

The ICRA was passed with the declared purpose "to secur[e] for the American Indian the broad constitutional rights afforded to other Americans." Santa Clara, 436 U.S. at 61 (quoting S. Rep. No. 841, 90th Cong. 1st Sess. 5-6

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[19] Section 1302(8) of the ICRA states in relevant part: "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." (emphasis added). As the Court in Santa Clara points out, this is not deemed to explicitly identify with the Bill of Rights or the Fourteenth Amendment of the U.S. Constitution. See 436 U.S. at 63 n.14.

[20] In § 1302(8), Congress offered reassurance that no tribal government would deny to any members the equal protection of the Tribe's laws. Furthermore, the ICRA does not include other constitutional freedoms, such as the prohibition as to the establishment of religion, the right of counsel, etc. See 436 U.S. at 62-63.

(1967)). The passage of the ICRA resulted from congressional concern in the early 1960s that individual Native Americans had no constitutional rights under their tribal governments. See Alvin J. Ziontz, In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act, 20 S.D. L. Rev. 1, 1-2 (1975). The congressional subcommittee first considering the legislation "heard a great deal of testimony from Indians complaining of violations of constitutional rights by the governing bodies of Indian tribes." Id. at 2. These allegations included incidents such as harassment and detention of political dissidents, corruption of tribal courts, and—notably—election fraud. See Joseph de Raismes, The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government, 20 S.D. L. Rev. 59, 73 (1975). Most commentators agree that in enacting the ICRA, Congress "sought to achieve a balance between individual rights of tribal members on the one hand and preservation of tribal autonomy, Indian customs, law and culture on the other." Ziontz, supra, at 2; see also Cohen, supra, at 666-69. Initially, a bill was contemplated to impose the same limitations on tribes as were imposed on the federal government in regard to civil rights. Cohen, supra, at 666. The end result was an act with only some of those restrictions. Id. From this reading of the legislative history, it is clear that Congress was sensitive to the question of tribal sovereignty when drafting the ICRA.

Section 241 prohibits a conspiracy to deny any person the enjoyment of a right or privilege secured by the Constitution or laws of the United States. It is the government's position that the conspiracy under § 241 was specifically directed to a law of the United States, i.e., violation of § 1302 of the ICRA. Under this theory, we must first address whether § 241 specifically applies to fraud in a tribal election.

Citing an eighty-year-old case, United States v. Bathgate, 246 U.S. 220, 225 (1918), the defendants argue that federal

election fraud statutes do not extend to fraud in a general state election, and therefore should not apply to a tribal election either. But since the Bathgate decision, the Supreme Court has construed § 241 to include all rights or privileges secured by the Constitution or laws of the United States. See United States v. Guest, 383 U.S. 745, 753 (1966) (Section 241 protects equal protection rights under the Fourteenth Amendment.). More specifically, the court in Anderson v. United States, 417 U.S. 211, 226 (1974) stated that "[t]he specific intent required under § 241 is not the intent to change the outcome of a federal election, but rather the intent to have false votes cast. . . ." Subsequent to Anderson, the application of § 241 to fraud in non-federal elections has been endorsed by this circuit, as well as several others. See United States v. Townsley, 843 F.2d 1070, 1080 (8th Cir.), vacated in part on other grounds, 856 F.2d 1189 (8th Cir. 1988); United States v. Howard, 774 F.2d 838, 841 (7th Cir. 1985); United States v. Stollings, 501 F.2d 954, 955 (4th Cir. 1974).

In Townsley, our court specifically held that even though the objective of the conspiracy was to influence a local rather than federal election, that did not defeat the specific intent necessary to establish a conspiracy against the rights of citizens under § 241. 843 F.2d at 1080. The court stated: "Regardless of what our view might have been were we writing on a clean slate, it is now clear that '[t]he specific intent required under § 241 is not the intent to change the outcome of a federal election, but rather the intent to have false votes cast. . . . '" Id. (quoting Anderson, 417 U.S. at 226). In this case, Rawley and Clark were accused of conspiring to fraudulently cast ballots in a tribal election. Under Anderson, as long as the purpose of the conspiracy was the violation of a federal law, the conspiracy is unlawful under federal law. See 417 U.S. at 226.

The specific question we must then address is whether the ICRA, as a law of the United States, contains a prohibition

which allows enforcement of § 241 under general principles of conspiracy law. The ICRA specifically proscribes a violation of the Tribe's equal protection laws, as well as other constitutional rights of the Tribe. See § 1302(8). Article XIII of the Constitution of the Minnesota Chippewa Tribe reads:

> All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe, and no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law.

(emphasis added). By direct incorporation, these rights are now explicitly protected by the ICRA. We hold they are enforceable under § 241, as a general federal law.

In addressing ballot-box stuffing in federal or state elections, the Seventh Circuit observed in United States v. Olinger, 759 F.2d 1293, 1303 (7th Cir. 1985):

> [T]he right of suffrage, whether in an election for state or federal office, is one that qualifies under the Equal Protection Clause of the Fourteenth Amendment for protection from impairment, "when such impairment resulted from dilution by a false tally, cf., United States v. Classic, 313 U.S. 299 (1941); or by a refusal to count votes from arbitrarily selected precincts, cf., United States v. Mosley, 238 U.S. 383 (1915), or by a stuffing of the ballot box, cf., Ex Parte Siebold, 100 U.S. 371 (1879); United

> States v. Saylor, 322 U.S. 385 (1944)." Baker v. Carr, 369 U.S. 186, 208 and 247-48 (1962). This was bluntly stated in Reynolds v. Sims, 377 U.S. 533, 554-55 (1964): "[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. . . . The right to vote can neither be denied outright, ... nor diluted by ballotbox stuffing....

We believe it is clear this protection against voter fraud has been carried over into the ICRA, as it is applies to the facts of this case. This court previously recognized the one-man-one-vote principle applies to tribal elections through the ICRA. See White Eagle v. One Feather, 478 F.2d 1311, 1314 (8th Cir. 1973); Daly v. United States, 483 F.2d 700, 704-05 (8th Cir. 1973); Means v. Wilson, 522 F.2d 833, 839 (8th Cir. 1975).[21]

The defendants urge that these cases have all been implicitly overruled by the Santa Clara decision. In Santa Clara, a female tribe member brought an action for injunctive and declaratory relief against the Pueblo tribal government, alleging that a Pueblo ordinance which denied tribal membership to children of female members who married outside the tribe was a violation of equal protection under the ICRA. 436 U.S. at 52-53. The Supreme Court found that suits against the tribe under the ICRA were barred by the tribe's sovereign immunity, because nothing on the face of the ICRA purported to subject the tribes to the Jurisdiction of federal courts in civil actions for declaratory or injunctive

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[21] These cases are pre-Santa Clara, recognizing an implicit right to civil action under the ICRA against tribal officers and tribal councils. Santa Clara rejected the rights of tribal members to bring such civil suits in federal court, and also established that tribal counsels enjoy sovereign immunity from suit. See infra. We cite these pre-Santa Clara cases simply as a recognition of the one-man-one-vote principle included in the ICRA.

relief. Id. at 58-59. Additionally, the Court found that the ICRA did not impliedly authorize a private right of action against the Pueblo government. Id. at 72.

There are several reasons why the Santa Clara ruling does not control this case. First, in the case at hand, the government is asserting jurisdiction under § 241, not under the ICRA. The only reason the ICRA needs to be referenced at all in this case is to establish that a right to be free from fraud in a tribal election does indeed exist under the laws of the United States. There is nothing in the language of Santa Clara to indicate that the rights under the ICRA are nonexistent or in any way invalid. Instead, Santa Clara dealt with how those rights may be enforced, and concluded they could not be enforced through a private right of action, in a civil lawsuit. Nothing in Santa Clara addresses the U.S. government's right or obligation to assume criminal jurisdiction when one of its laws of generally applicability is violated. Additionally, tribal immunity is not at issue in the present criminal case.

Second, in Santa Clara the Court was faced with a challenge to a duly enacted ordinance of the tribal government. In such a case, the threat to tribal sovereignty is great because a federal court would be asked to sit in judgment of legislation enacted by a legitimate tribal government. In this case, the question is whether jurisdiction can be asserted over the illegitimate, criminal action of fraud in a tribal election. Unlike Santa Clara, there is no challenge to the legitimate actions of the tribe or its representatives. The charge is directed toward the individual members of the RTC who conspired to deprive the members of the Band of their civil rights guaranteed by the ICRA. The Band's right to self-determination, which the court sought to protect in Santa Clara, is not being threatened by ensuring that voters are not defrauded. In fact, the Band's right to free and open elections is vindicated by the present criminal action.

Third, in Santa Clara, the Court stressed that tribal courts are available to vindicate rights created by the ICRA and are the appropriate forums to do so. 463 U.S. at 65. But again, this is stated in the context of a civil action. In a criminal context—when the entire tribal system allegedly is controlled by a few corrupt individuals—there is no effective tribal forum available to protect an individual tribal member's civil rights.

Finally, even if jurisdiction in this case was asserted under the ICRA, Santa Clara would not be dispositive, because the absence of a private right of action does not mean absence of criminal jurisdiction. Rawley argues that "no voter could be a victim of a § 241 conspiracy if that voter could not enforce his or her voting rights under federal law in a civil action in a federal court." Rawley Br. at 28. If by this the defendant means to imply that criminal jurisdiction cannot exist without a corresponding private right of action, his premise is incorrect. Courts repeatedly have held that there is no private right of action under § 241, even though the statute allows federal authorities to pursue criminal charges. See, e.g., Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) ("Only the United States as prosecutor can bring a complaint under 18 U.S.C. §§ 241-242 . . . These statutes do not give rise to a civil action for damages."); Lerch v. Boyer, 929 F. Supp. 319, 322 (N.D. Ind. 1996) (Federal criminal statute governing conspiracies against civil rights did not provide for private right of action). There are numerous other criminal statutes which the courts have found do not imply a private right of action, including the Securities and Exchange Act, see Central Bank v. First Interstate Bank, 511 U.S. 164, 190-91 (1994); the Ashurst-Sumners Act governing shipment of prisoner-made goods in interstate commerce, see McMaster v. Minnesota, 30 F.3d 976, 981-82 (8th Cir. 1994); the federal wire fraud statute, see Official Publications Inc. v. Kable News Co., 884 F.2d 664, 667 (2d Cir. 1989); and the Federal

Elections Campaign Act, see Cort v. Ash, 422 U.S. 66, 79-84 (1975).

For these reasons, Clark and Rawley cannot rely on the Santa Clara decision to support their argument that federal Jurisdiction under § 241 cannot be asserted. The decision regarding private rights of action brought under the ICRA against a tribal government does not address the question of criminal jurisdiction asserted in this case.

In Stone, this court recently recognized that tribal sovereignty is "necessarily limited" and "must not conflict with the . . . overriding sovereignty of the United States." 112 F.3d at 974 (quoting United States v. Sohappy, 770 F.2d 816, 819 (9th Cir. 1985)). "Federal laws of general applicability [such as § 241] 'are applicable to the Indian unless there exists some treaty night which exempts the Indian from the operation of the particular statutes in question.'" Id. (quoting Burns, 529 F.2d at 117). No such treaty right—to be free to conduct fraudulent elections against their people—is asserted here by the defendants.

Contrary to the Clark and Ramsey's argument, we find there is no reason why federal criminal jurisdiction over election fraud would work to undermine the sovereignty of the tribe or its political integrity. First, no tribal custom or tradition is being threatened by the enforcement of criminal conspiracy laws. There is no tribal custom or tradition of the Band of fraudulently using the election system to maintain positions of power for a few corrupt individuals.

Second, as the Supreme Court stated in Santa Clara, tribal courts are the preferable forum to resolve most issues arising out of the rights granted by the ICRA. 436 U.S. at 65-66. This allows legitimate tribal governments to shape their own internal policy and assert their right to self-determination, and at the same time provides individual Native Americans a forum to air their grievances. However, tribal members are not able to practice self-determination

when, as is alleged here, a few corrupt individuals effectively control the entire tribal system. No purpose of tribal autonomy is served by allowing a corrupt, unrepresentative system to continue unabated.

Finally, it is relevant to note that tribal governments are dependent sovereigns—not independent foreign ones. As part of this dependent status, the U.S. government serves as a trustee and has a direct responsibility as a trustee to protect the civil rights granted by Congress to the Native Americans living on the reservations. We believe failure of the United States to assert criminal jurisdiction over activity on a reservation when the tribal government no longer operates legitimately would be an abrogation of the U.S. government's trustee relationship with tribes such as the Chippewa. We thus conclude that Clark and Rawley may be prosecuted in federal court under § 241 because such conspiracy encompassed a violation of the ICRA, a law of the United States.

IV. Defendants' Other Challenges

A. Joinder and Severance

Before trial, Clark and Wadena[22] moved to sever Counts 1 through 28 (the non-election counts) from Counts 29 through 44 (the election counts), alleging the two groups involved separate and unrelated acts and transactions and were improperly joined. The defendants also argued they would be prejudiced by the joinder of the offenses because during trial, such joinder would allow the introduction of evidence that is not relevant to some of the conspiracies. For example, the defendants asserted that evidence related to the

[22] Rawley does not contest the joinder of the counts charged in this case.

election fraud conspiracy is not relevant to the conspiracies involving the Casino or the Commissions. The government asserted joinder was proper, alleging Clark, Rawley, and Wadena joined in multiple conspiracies to misapply tribal funds for their personal use.

Following a hearing on the defendants' pre-trial motion for severance, the district court referred the matter to a federal magistrate judge for a report and recommendation. In his report and recommendation, the magistrate judge concluded that on the face of the Indictment, the government did not allege a "single, common purpose connecting the election fraud allegations to the casino and fishing commission allegations." United States v. Wadena, Crim. No. 3-95-102 (D. Minn. Jan. 24, 1996) (magistrate judge's report and recommendation on defendants' pretrial motions). The magistrate judge recommended that the district court sever Counts 1 through 28 from Counts 29 through 44. Id.

The district court[23] disagreed, concluding the Indictment alleged three conspiracies that were a part of a series of acts or transactions, and joinder was proper. United States v. Wadena, No. 3-95-102 (D. Minn. April 11, 1996) (order adopting portions of magistrate judge's report and recommendation). The court also noted that although "a joint trial may result in evidence being admitted against one defendant that would otherwise be irrelevant in the trial of a co-defendant, the Court finds that any prejudice that may result may be avoided through limiting instructions to the jury." Id. The district court denied the defendants' motion to sever, finding severance was not warranted. Id. During trial, the district court continued to deny defendants' motions to sever.

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[23] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

In the present appeal, Clark and Wadena dispute the district court's joinder of Counts 1 through 28 with Counts 29 through 44. Alternatively, they dispute the district court's denial of their motion to sever the counts. We address the defendants' claims separately.

1. Joinder under Federal Rule of Criminal Procedure 8

Federal Rule of Criminal Procedure 8 establishes the requirements for joinder of offenses or defendants in the same indictment.[24] Under Rule 8(b), defendants are properly joined "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). Generally, the "same series of acts or transactions" means acts or transactions that are pursuant to a common plan or a common scheme. See United States v. Jones, 880 F.2d 55, 61 (8th Cir. 1989). "[T]he defendants need not be charged in each count." Fed. R. Crim. P. 8(b). An indictment must

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[24] Rule 8 provides:

> (a) **Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) **Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8.

reveal on its face a proper basis for joinder. See United States v. Bledsoe, 674 F.2d 647, 655 (8th Cir. 1982).

This Court reviews de novo claims of misjoinder. An error involving misjoinder "'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" United States v. Lane, 474 U.S. 438, 449 (1986) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

a. Propriety of Joinder with Respect to Clark

Clark asserts joinder under Rule 8(b) was improper because the Indictment alleges three separate conspiracies as opposed to one overall scheme. Clark contends the government links the three conspiracies solely through an "overlap in personnel" and a "common objective of making money," and such connections are an insufficient basis for joinder. See Clark Br. at 39-40. Clark also claims the government's assertions that Clark, Rawley, and Wadena engaged in the non-election conspiracies to misapply tribal funds, and Clark and Rawley engaged in the election conspiracy to further that objective, are "unsupported by the indictment and factually impossible." Id. at 40-41. This is because Clark ran unopposed in the 1994 election, and according to the Indictment, the non-election conspiracies were complete in March 1994–three months before the June 1994 election.

We disagree with Clark's contentions. In this case, the government charged Clark with all of the offenses relating to both the non-election conspiracies and the election conspiracy. The government asserted Clark joined in the non-election conspiracies to misapply tribal funds for his personal gain. The government also contended Clark joined in the election conspiracy to ensure his and others' elections and his

continued access to tribal funds. On its face, the Indictment alleges more than a mere overlap in personnel and the common objective of making money. We deem it clear that the Indictment alleges Clark participated in a series of acts or transactions with the sole purpose of furthering a common scheme of using his and others' positions in tribal government to access tribal funds and misapply those funds for his personal gain. Thus, joinder of all counts was proper under Federal Rule of Criminal Procedure 8(b).[25]

Moreover, were we to find joinder improper with respect to Clark, such error would not require reversal. See Lane, 474 U.S. at 449. Clark contends reversal is required because he has made a showing that there was a misjoinder that had a substantial and injurious effect on the jury's verdict. Specifically, Clark claims the government used a "regrettable parade of cumulative witnesses," most of whom merely testified that they did not vote in the last tribal election, to show his bad character and impermissibly influence the jury's determination of guilt with respect to the non-election charges. See Clark Br. at 42.

We disagree with Clark's contentions for several reasons. First, during trial, the government presented evidence of the charged conspiracies in three discrete phases. Second, although the government presented numerous witnesses who testified they did not vote in the last tribal election, it is difficult to see how this testimony, which was specific to the election conspiracy, influenced the jury's findings with respect to the construction conspiracy and Commissions conspiracy. Third, the district court instructed the jury that each defendant was entitled to be treated separately, and the jury must return a separate verdict for each defendant and for each crime

[25] Clark's contentions that joinder is improper because the election conspiracy came later than the other two conspiracies, and because he ran unopposed in the election, obfuscates the issue and ignores the singular and common purpose of Clark's involvement in the three conspiracies.

charged. See, e.g., Jury Inst. 12, United States v. Wadena, No. 3-95-102 (D. Minn. June 24, 1996). The jury ultimately acquitted one defendant of all charges and acquitted Clark and Rawley of one charge each. Finally, the government presented potent evidence of Clark's guilt of the charges for which he was convicted. In sum, we conclude that any alleged misjoinder did not have a substantial and injurious effect or influence on the jury's verdict with respect to Clark. See Lane, 474 U.S. at 449.

b. Propriety of Joinder with Respect to Wadena

Like Clark, Wadena argues joinder in this case was improper. In particular, Wadena claims that because the government did not allege that he was in any way involved in the election conspiracy, he should not have been tried with the other defendants who were alleged to have participated in all three conspiracies.[26] For the reasons discussed below, we conclude that even if misjoinder occurred with respect to Wadena, any such error did not have a substantial and injurious effect or influence on the jury's verdict, and reversal is not required.

Wadena alleges the government turned his trial into an "election fraud circus" by calling 136 election fraud witnesses to the stand, introducing nearly 600 election fraud exhibits, and stating in its closing argument that all the defendants were guilty of "controlling the ballot box in order to control the cashbox." See Wadena Br. at 22-23. Wadena asserts he suffered "overwhelming" prejudice in this "politically charged" trial. Id. at 23.

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[26] Like Clark, Wadena also asserts the three alleged conspiracies were unrelated to one another, and the government's attempt to link the three conspiracies through an "overlap in personnel" and a "common objective of making money" is an insufficient basis for joinder. As stated above, we reject this allegation.

We disagree. As noted above, the government presented evidence relating to the three conspiracies in three distinct phases. When the government referred to the election conspiracy in its opening statement, case-in-chief, and closing argument, it specifically referred to the involvement of Clark and Rawley in that conspiracy. While Wadena correctly asserts that the government presented numerous witnesses who testified in the election conspiracy phase of the trial, as we stated above with respect to Clark, the majority of those witnesses simply testified they did not actually vote in the 1994 election even though ballots were cast in their names.[27] Further, a large portion of the exhibits presented during the election conspiracy phase of the trial consisted solely of various absentee ballots. Overall, we do not believe the evidence presented in relation to the election conspiracy caused the jury to convict Wadena of the charges arising from the other two conspiracies.

Wadena also alleges he suffered prejudice because the district court failed to instruct the jury not to consider the extensive election fraud evidence against him. See Wadena Br. at 24, n.15. This argument is specious. Perhaps the district court did not specifically tell the jury not to consider any election fraud evidence against Wadena. However, in essence the district court told the jury to do the same thing when, as noted above, it admonished the jury to treat each defendant separately and return a separate verdict for each defendant and for each crime charged. Finally, the government presented strong evidence of Wadena's guilt in the offenses relating to the construction conspiracy and the Commissions conspiracy. From our de novo review of the record, we conclude that any misjoinder with respect to

[27] Significantly, one election conspiracy witness who did mention Wadena indicated it was Wadena who called the sheriff when he learned from a government investigator that certain election documents under investigation may have been deliberately shredded.

Wadena was harmless, and reversal is not required. See Lane, 474 U.S. at 449.

2. Severance under Rule 14

Federal Rule of Criminal Procedure 14 allows the trial court to order severance even if joinder was proper under Rule 8(b).[28] The decision to sever is within the sound discretion of the trial judge. See Jones, 880 F.2d at 61 (citing United States v. Adkins, 842 F.2d 210, 212 (8th Cir. 1988)). "We reverse a denial of a motion to sever only when the defendant shows an abuse of discretion that resulted in severe prejudice." United States v. Crouch, 46 F.3d 871, 875 (8th Cir. 1995). "Severe prejudice occurs when a defendant is deprived of an appreciable chance for an acquittal, a chance that [the defendant] would have had in a severed trial." United States v. Koskela, 86 F.3d 122, 126 (8th Cir. 1996).

a. Propriety of the Refusal to Sever with Respect to Clark

Clark contends the district court's refusal to sever the offenses and the defendants was a failure to follow Rule 14 and constitutes an abuse of its discretion. Clark argues this

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[28] Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Fed. R. Crim. P. 14.

refusal to sever the election counts from the non-election counts severely prejudiced him. In support of this assertion, Clark argues the trial was complex and lengthy, and the government's evidence relating to the election conspiracy overwhelmed and confused the jury, prevented the jury from compartmentalizing the evidence, and tainted its verdict. He argues the district court's jury instructions failed to "sufficiently negate the harmful error in this case." Clark Br. at 44.

From our review of the record, and for the reasons discussed above with respect to joinder, we conclude the district court's refusal to sever did not deprive Clark of an appreciable chance of acquittal. Therefore, the district court's refusal to sever was within its discretion. See Crouch, 46 F.3d at 875; Koskela, 86 F.3d at 126.

b. Propriety of Refusal to Sever with Respect to Wadena

Wadena contends that when the district court repeatedly refused to sever his trial from that of the other defendants, it abandoned its duty under Rule 14 and abused its discretion. In support of this argument, Wadena makes essentially the same contentions he made with respect to joinder. From our review of the record, and for the reasons discussed above with respect to joinder, we conclude the district court's refusal to grant Wadena's Rule 14 motion to sever did not cause him severe prejudice. See Crouch, 46 F.3d at 875; Koskela, 86 F.3d at 126.

B. Alleged Misuse of Civil IRS Audit

Clark and Wadena contend that in late 1993, the IRS conducted a civil audit of Northern with the express and undisclosed purpose of gathering information for a criminal investigation. Specifically, they allege the government's chief

investigator in this case, Agent Michael Nelson of the IRS' Criminal Investigation Division ("CID"), had knowledge that IRS auditors were preparing to conduct a civil audit at the time the government was conducting a criminal investigation into the same matters to be examined by the civil audit. As supporting evidence of this contention, Clark and Wadena assert that in early November 1993, before the IRS formally notified defendants of the upcoming civil audit, Agent Nelson asked Greg Nygren, an IRS representative working on the civil audit, to fax him a copy of a past tax return of Wadena's. The civil audit was not referred to the CID until 1994.

Clark and Wadena complain the IRS's simultaneous investigations violated their Fourth and Fifth Amendment rights. During trial, Clark and Wadena made various motions to suppress the evidence obtained from the civil audit and any evidence derived therefrom. The district court denied the motions. On appeal, Clark and Wadena claim the district court erred in denying their motions. We review for clear error the facts supporting a district court's denial of a motion to suppress. See United States v. Cunningham, 133 F.3d 1070, 1072 (8th Cir. 1998) (citing Ornelas v. United States, 116 S. Ct. 1657, 1663 (1996)), petition for cert. filed, __ U.S.L.W. __ (U.S. April 13, 1998). We review de novo the legal conclusions based upon those facts. Id.

"[T]he IRS may not develop a criminal investigation under the auspices of a civil audit." United States v. Grunewald, 987 F.2d 531, 534 (8th Cir. 1993).

> Evidence obtained in the course of a criminal investigation, where the defendant has not been apprised of the nature of the investigation, may be suppressed only if the defendant establishes that: 1) the IRS had firm indications of fraud by the defendant, 2) there is clear and convincing evidence that the IRS affirmatively and intentionally misled

the defendant, and 3) the IRS's conduct resulted in prejudice to defendant's constitutional rights.

Id. (citing United States v. Meier, 607 F.2d 215, 217 (8th Cir. 1979) and United States v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977)) (emphasis added). Although Clark and Wadena allude to the three Grunewald factors, they do not directly address the factor or acknowledge their burden to establish the existence of those factors. See Wadena Br. at 10-19; Clark Br. at 44-46. Instead, they focus their arguments on Agent Nelson's knowledge of and alleged direction of the simultaneous criminal investigation and civil audit, as well as his alleged failure to refer the case to the CID. For the reasons discussed below, we conclude the defendants have not shown the existence of the Grunewald factors, and the IRS's investigations did not violate their Fourth and Fifth Amendment rights.

An IRS auditor conducting a civil audit who detects a firm indication of fraud must suspend the audit and refer the case for evaluation by the CID. See Grunewald, 987 F.2d at 534 (citing Audit Guidelines for Examiners, CCH Internal Revenue Manual (Audit), §§ 4231, 4564.21, 9322.1). A firm indication of fraud is different than an initial indication that fraud exists, and it is more than a mere suspicion of fraud. See Groder v. United States, 816 F.2d 139, 143 (4th Cir. 1987). Whether Nygren (the civil auditor) had a firm indication of fraud and failed to suspend the civil audit is a question of fact we review for clear error. See Cunningham, 133 F.3d at 1072. Clark and Wadena do not present any evidence showing that Nygren had a firm indication of fraud and failed to suspend the civil audit of Northern. Further, Nygren specifically denied he suspected any fraud when he mailed the audit letter to Northern. Our review of Nygren's trial testimony pertaining to the simultaneous investigations likewise does not indicate Nygren had a firm indication of

fraud and failed to refer the case to the CID. Thus, neither Clark nor Wadena have established the first Grunewald factor.

"[T]he mere failure of an IRS agent to inform a defendant that information developed in an audit may result in a further criminal investigation does not indicate affirmative and intentional deceit by the IRS." Grunewald, 987 F.2d at 534. Clark and Wadena do not present clear and convincing evidence that the IRS affirmatively and intentionally misled the defendants by conducting the civil audit of Northern with the express purpose of obtaining records for the criminal investigation. Indeed, defendants point to nothing more than knowledge by Nygren that Agent Nelson was conducting a criminal investigation. Neither Clark nor Wadena have established the second Grunewald factor. Given Clark's and Wadena's failure to establish the first two Grunewald factors, we need not address the third Grunewald factor. In sum, we conclude the district court did not err when it denied Clark's and Wadena's various motions to suppress the evidence obtained from the civil audit and any evidence derived therefrom.

C. Count 19 as a Cognizable Offense

As noted above, Count 19 of the Indictment charged Clark, Rawley, and Wadena with conspiring to misapply tribal funds, in violation of 18 U.S.C. § 1163. The object of this conspiracy was to obtain tribal funds in the form of excessive payments for serving on the Commissions. The overt acts undertaken in furtherance of this conspiracy included the creation of the Commissions and the defendants' receipt of various commission payments. The jury convicted all three defendants of this charge.

Before trial, the defendants moved to dismiss Count 19. The district court denied their motions. In the present appeal,

Clark and Wadena contend the district court erred in not dismissing Count 19, because the count fails to allege a cognizable offense.[29] They argue that all of the overt acts alleged to have been committed in Count 19 were official actions taken pursuant to their capacities as members of the RTC, and the RTC as an entity or governmental body cannot conspire with itself. Clark and Wadena base this contention on Runs After v. United States, 766 F.2d 347, 354 (8th Cir. 1985), which they claim controls this case.

In Runs After, several members of the Cheyenne River Sioux challenged the validity of two resolutions passed by the Cheyenne River Sioux Reservation Tribal Council (Tribal Council). 766 F.2d at 349. The two resolutions, passed by a vote of the Tribal Council, barred certain tribal members from running in future tribal elections. Id. The plaintiffs challenged the resolutions under various federal civil rights statutes. The court rejected the plaintiffs' challenges, concluding, in part, that "individual members of the Tribal Council, acting in their official capacity as tribal council members, cannot conspire when they act together with other tribal council members in taking official action on behalf of the Tribal Council." Id. at 354 (citing Herrmann v. Moore, 576 F.2d 453, 459 (2d Cir. 1978) (stating there is no conspiracy if the conspiratorial conduct is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his or her employment)).

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[29] Rawley does not raise this issue in his brief. The government, in a footnote, also claims Clark did not raise this issue below and is therefore barred from making this argument for the first time on appeal. The government provides no legal or factual support for this contention. Moreover, Clark contends he raised the issue below because at the pretrial motion hearing, he adopted Wadena's and Rawley's motions and arguments concerning jurisdiction, and this is a jurisdictional issue. For purposes of this appeal, we will assume Clark raised this issue below.

Runs After is a civil suit involving a dispute between tribal members. It is not a criminal case alleging violations of federal criminal law by a tribal entity or by members of a tribal entity. More importantly, Runs After involved the conduct of tribal council members regarding two official acts of the entire tribal council–the passing of two resolutions. In the present case, it appears there was an official act of the RTC to create the Commissions. It also appears there was an official act by the RTC to approve a commission payment range for each member. However, these are not the only overt acts alleged by Count 19. The count also alleges numerous overt acts in which Clark, Rawley, and Wadena, when they wanted money for purchases, debts, etc., individually directed the tribe to issue them checks labeled as commission payments. These individual payments were not collectively approved or issued by the RTC. For these reasons, we conclude Runs After is distinguishable from this case. As Clark and Wadena provide no other support for this argument, we conclude Count 19 alleged a cognizable offense, and the district court did not err when it denied their motions to dismiss the count.

D. Interstate Nexus in Money Laundering Counts

The Indictment charged Clark and Wadena with various counts of money laundering, in violation of 18 U.S.C. § 1957. At the close of the government's case, Clark and Wadena filed motions for judgment of acquittal on these counts pursuant to Federal Rule of Criminal Procedure Rule 29. They argued that during its case-in-chief, the government offered no evidence to prove the element of an interstate commerce nexus, which is an essential element of any § 1957 violation. The district court denied their motions.

In the present appeal, Clark and Wadena contend the district court erred in denying their Rule 29 motions. In

response, the government claims the defendants waived their right to challenge the denial of their motion when they failed to renew the motion at the close of evidence, and even if this court concludes the defendants did not waive their right to appeal the denial of their motion, the government nonetheless presented sufficient evidence to prove the element of an interstate commerce nexus. We address the government's waiver argument first.

Generally, a defendant waives the right to appeal a denial of a motion for acquittal if the defendant fails to renew the motion at the close of all of the evidence. See Edwards v. United States, 333 F.2d 588, 589 (8th Cir. 1964). Such a waiver limits the scope of appellate review to a determination of whether there was plain error or a defect affecting the substantial rights of the defendant. See id. It appears neither Wadena nor Clark renewed their motion for acquittal at the close of the evidence. Thus, it is likely they waived their right to appeal the denial of the motion. See id. Nonetheless, because the government's alleged failure to prove an essential element of the money laundering offenses would be a defect affecting the substantial rights of Clark and Wadena, we will address the issue of whether the government presented sufficient evidence to prove the element of an interstate commerce nexus.

It appears this court has not determined the quantum of evidence necessary to prove the element of an interstate commerce nexus in § 1957 cases. Other circuits, however, have held evidence that the transaction in question was in interstate commerce or utilized the instrumentalities of interstate commerce is sufficient proof of the element of an interstate commerce nexus. See, e.g., United States v. Kunzman, 54 F.3d 1522, 1527 (10th Cir. 1995) (concluding evidence of checks drawn on federally-insured banks and services purchased from an out-of-state company is sufficient to support finding of interstate commerce nexus); United

States v. Peay, 972 F.2d 71, 74-75 (4th Cir. 1992) (concluding evidence that funds were deposited and withdrawn from an FDIC-insured institution provided sufficient proof of an interstate commerce nexus). The government presented evidence that the checks referenced in Counts 10 through 18 were all deposited in either the First National Bank of Detroit Lakes, Minnesota or the State Bank of Winger, Minnesota. As these institutions are FDIC-insured, the government's evidence that these checks were deposited into these institutions is sufficient proof of an interstate commerce nexus. See, e.g., Kunzman, 54 F.3d at 1527. Thus, the district court did not err when it denied Clark's and Wadena's Rule 29 motions.

E. Admission of Government's Exhibit 97

During trial, the government presented exhibit 97 for admission into evidence. Exhibit 97 consisted of a Northern check numbered 3657 in the amount of $15,000, signed by Clark, and made payable to Jerry Rawley. The exhibit also consisted of the check's register stub bearing the number 3657, the name Jerry Rawley, and the amount of $15,000. Significantly, the stub also contained a partially-erased pencil notation "gift." Before trial, Rawley raised three objections to the admission of the check stub portion of the exhibit into evidence: 1) failure to authenticate; 2) hearsay; and 3) denial of his Sixth Amendment right to confront witnesses against him. The district court admitted exhibit 97 into evidence.

On appeal, Rawley contends we must reverse his convictions of Counts 1, 3, and 4, because the district court erred in admitting exhibit 97. We review for abuse of discretion the district court's decision that exhibit 97 was authenticated and did not constitute inadmissible hearsay. See United States v. Henneberry, 719 F.2d 941, 948 (8th Cir. 1983); United States v. Jackson, 67 F.3d 1359, 1364 (8th Cir.

1995). We review de novo the district court's decision that admission of exhibit 97 did not violate Rawley's Sixth Amendment rights. See United States v. Johnson, 56 F.3d 947, 953 (8th Cir. 1995).

We address Rawley's authentication argument first. A party authenticates a document by presenting evidence sufficient to support a finding that the document is what the party claims it to be. See Fed. R. Evid. 901(a). The party authenticating a document need only prove a rational basis for that party's claim that the document is what it is asserted to be. See United States v. Long, 857 F.2d 436, 442 (8th Cir. 1988) (citing United States v. Natale, 526 F.2d 1160, 1173 (2d Cir. 1975)). "This may be done with circumstantial evidence." Id. The government offered sufficient evidence to authenticate exhibit 97. Thus, the district court did not abuse its discretion when it decided the government properly authenticated exhibit 97.

Rawley's next contention is that the district court abused its discretion when it concluded the partially-erased word "gift" on the check register was not hearsay. A written statement that would ordinarily be defined as hearsay is not hearsay if the statement is offered against a party, and it is a statement of a co-conspirator of the party made during the course of and in furtherance of a conspiracy. See Fed. R. Evid. 801(d)(2)(E). The "gift" notation falls within the scope of Federal Rule of Evidence 801(d)(2)(E). Therefore, we conclude the district court did not abuse its discretion when it decided the statement "gift" is not hearsay. Additionally, after a de novo review of Rawley's Sixth Amendment challenge, we conclude it is without merit.

F. Jury Instructions

The defendants allege four errors relating to the district court's instructions to the jury. First, Clark[30] and Wadena allege the district court invaded the province of the jury by instructing the jury that the government had already proven the essential elements of two charged offenses: theft or bribery concerning programs receiving federal funds, in violation of 18 U.S.C. § 666 and misapplication of tribal funds, in violation of 18 U.S.C. § 1163. Second, Clark and Wadena claim the district court deprived them of due process and a fair trial when it failed to instruct the jury regarding the required intent of a § 666 violation and a § 1163 violation. Third, Rawley contends the district court erred in submitting a jury instruction relating to Minnesota notary law. Finally, Rawley contends the district court erred when it refused to provide the jury with a theory of defense instruction he requested. We address these arguments in turn.

1. Instructions Regarding Essential Elements of Offenses

In jury instruction 29, the district court cited to the jury pertinent aspects of 18 U.S.C. § 1163, including the section's definition of the term "Indian tribal organization." The court then stated "[t]he White Earth Band of the Minnesota Chippewa Tribe is an Indian tribal organization." Jury Inst. 29, United States v. Wadena, No. 3-95-102 (D. Minn. June 24, 1996). In jury instruction 33, the district court listed the elements of an 18 U.S.C. § 666 violation. One element of a § 666 offense is that the accused must be an agent of an Indian tribal government or any agency thereof 18 U.S.C. § 666

[30] Clark adopts Wadena's arguments regarding jury instructions pursuant to Federal Rule of Appellate Procedure 28(j) and Eighth Circuit Rule of Appellate Procedure 28A(j).

(emphasis added). In jury instruction 33, the court told the jury it must find "that during the time period alleged in each count the defendant was an agent of the White Earth Band of Chippewa Indians." Jury Inst. 33, United States v. Wadena, No. 3-95-102 (D. Minn. June 24, 1996). Clark and Wadena assert that whether the Band was an Indian tribal organization under § 1163, and whether the Band was an Indian tribal government under § 666, were questions for the jury, and the district court violated their Fifth and Sixth Amendment rights by instructing the jury that these essential elements of the § 1163 and § 666 offenses had already been proven.

A court may err when it instructs a jury that a fact essential to a defendant's conviction has already been established. See Sullivan v. Louisiana, 508 U.S. 275, 277 (1993). However, an error of this type is subject to harmless error review. See United States v. Raether, 82 F.3d 192, 194 (8th Cir. 1996). Clark and Wadena have vigorously asserted throughout this appeal that the federal courts lack jurisdiction over this entire case because of the Band's status as an independent sovereign and their statuses as members of the Band. Given this position, we do not see how the court's errors in jury instructions 29 and 33, if any, could have harmed either Clark or Wadena. Thus, without addressing whether the district court's jury instructions 29 and 33 were in fact erroneous, we conclude the claimed error was harmless.

2. Failure to Instruct on Intent

Clark and Wadena claim that the district court failed to instruct the jury that, with respect to violations of 18 U.S.C. § 666 and § 1163, the jury must find they acted with an intent to injure or defraud. We disagree. Neither § 666 nor § 1163 contain such a requirement. See 18 U.S.C. §§ 666 and 1163.

3. Instructions on Minnesota Notary Law

In jury instruction 53, the district court stated: "In taking an acknowledgment, verification, or witnessing a signature a notary must determine, that the person appearing before him or her is the person whose true signature is on the instrument. You are instructed that to do otherwise is a violation of state law." Jury Inst. 53, United States v. Wadena, No. 3-95-102 (D. Minn. June 24, 1996). Rawley objected to this instruction when the district court made it. On appeal, Rawley contends this instruction was irrelevant, and "[t]he only effect the instruction could have on the jurors was either to make the apparent state law violation somehow appear to be an element of the federal offenses, or to cast the failure [to properly notarize ballots] as evidence of bad acts by the defendants." See Rawley Br. at 35-36. We review instruction 53 for harmless error. See United States v. Ryan, 41 F.3d 361, 366 (8th Cir. 1994) (citing United States v. Voss, 787 F.2d 393, 398 (8th Cir. 1986)). In this case, the issue of whether numerous absentee ballots were properly notarized by state-certified notaries was an important aspect of the prosecution of the election conspiracy and offenses arising from that conspiracy. Thus, jury instruction 53 was not irrelevant and was not in error.

4. Rawley's Proposed Theory of Defense Instruction

With respect to the tribal election notarization process, Rawley also proposed jury instruction indicating, in part:

> Under the laws of the Minnesota Chippewa Tribe and the White Earth Band, a violation of the requirement that an absentee vote be marked and signed in the presence of a notary public did not invalidate any absentee vote prior to the June 14,

> 1994, election. Accordingly, in order to find that a defendant had the intent to have a false vote cast in the 1990 or 1994 election(s), you must find that the government proved such intent, beyond a reasonable doubt, by showing evidence that the defendant intended to cast false votes in the election other than with evidence of a mere violation of the requirement that an absentee vote be marked and signed in the presence of a notary public.

See Addendum to Rawley Br. Rawley contends he was entitled to this instruction because it was timely, supported by the evidence and set forth a correct statement of the law (i.e. 18 U.S.C. § 241). See Rawley Br. at 36-37 (citing United States ex rel., Means v. Solem, 646 F.2d 322, 328 (8th Cir. 1980)). We disagree. The district court adequately and correctly instructed the jury on the elements of the § 241 offenses, and Rawley is not entitled to particularly worded instructions regarding the § 241 offenses. Cf. United States v. Bettelyoun, 16 F.3d 850, 853 (8th Cir. 1994).

G. Sentencing Enhancement for Abuse of Trust in Money Laundering Offenses

Section 3B1.3 of the sentencing guidelines allows for a two-level increase "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense."[31] Legal application of the guidelines to the facts is reviewed de novo. See, e.g., United States v. Evans, 30 F.3d

[31] The guideline commentary states that "the position of trust must have contributed in some significant way to facilitate the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult.)" U.S.S.G. § 3B1.3, comment. (n.1) (1997).

1015, 1020 (8th Cir. 1994). However, the district court's application of § 3B1.3 is a factual finding, reviewed for clear error. See United States v. Johns, 15 F.3d 740, 744 (8th Cir. 1994) (stating abuse of trust adjustment is entitled to great deference and will not be disturbed unless clearly erroneous).

In sentencing Clark and Wadena, the district court refused to group the money laundering counts (Counts 10-18) with the remaining charges and convictions, finding that "the money laundering counts in this case were not an integral part of an overall scheme" to perpetuate theft or bribery. United States v. Clark, No. 3-95-102 (D. Minn. Nov. 26, 1996) (Statement of Reasons for Imposing Sentence), at 4. Despite this finding, the district court still used § 3B1.3 to apply a two-level enhancement to the money laundering charges for abuse of a position of public trust.

The government contends that the enhancements were correct because, while the money-laundering charges were grouped separately, the theft and fraud counts – which involved an abuse of trust – can be considered "relevant conduct" with respect to the money laundering. In addition, the government argues, Clark and Wadena's positions allowed the defendants to engage in money-laundering activity without questions from either the bank or the tribal community. In this sense, the government argues, their positions of trust "significantly facilitated" the commission or concealment of the offense.

The first problem with this reasoning is that, while the government argues Clark and Wadena's abuse of positions of trust to obtain illegal proceeds was relevant conduct, the district court specifically found the money laundering activity was not related to the theft and bribery schemes. Additionally, § 2C1.2 of the sentencing guidelines specifically states that when a crime involves giving or receiving a bribe or gratuity, a sentencing court should "not apply the adjustment in § 3B1.3 (Abuse of Position or Trust or Use of a

Special Skill)." U.S.S.G. § 2C1.2, comment. (n.2) (1997).[32] In other words, if the district court had grouped the money laundering and gratuity charges together, the guidelines would have directly prohibited an abuse of trust enhancement under § 3B1.3. By using the abuse of trust involved in the "related" bribery conduct to enhance the money laundering charges, the district court would be indirectly doing what § 2C1.2 of the guidelines directly prohibits.

Second, we find there is no evidence to support the assertion that the defendants' positions as public officials "significantly facilitated" the acts of money laundering. The indictment charges that, on nine separate occasions, Clark gave checks from Northern Drywall to Wadena, who subsequently deposited the checks into his personal accounts at the First National Bank of Detroit Lakes, and the Farmers State Bank of Winger. There is no proof presented that the banks or the bank tellers knew Wadena was chairman of the tribal council. The checks were not from or written to the tribal council, but instead were from a private company, Northern Drywall, with Clark as president. Finally, there is no indication on any of the checks that either defendant was acting in his capacity as an official of the tribal council.

In sum, the government has failed to carry its burden of proving Wadena and Clark's positions significantly facilitated the commission or concealment of the money-laundering activities. For this reason, we reverse the two-level abuse of discretion enhancement under § 3B1.3, and remand Clark and Wadena's sentences to the district court.

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[32] While the guidelines do not explain this rule, it appears the prohibition against using § 3B1.3 to enhance a bribery conviction is an effort by the sentencing commission to avoid "double counting." See United States v. Kummer, 89 F.3d 1536, 1546 (11th Cir. 1996) ("[G]enerally § 3B1.3 should not be applied in these [bribery or gratuity] cases because the Guidelines took into consideration the fact that such cases necessarily involve abuse of positions of trust.").

The judgments of conviction for each defendant are AFFIRMED. The sentences of Clark and Wadena are remanded to the district court for resentencing.[33]

BEAM, Circuit Judge, concurring and, in part, dissenting.

I concur in the result reached by the court in Part II and, with qualification,[34] Part IV. I disagree, however, with the court's conclusion in Part III that we have jurisdiction to prosecute Clark and Rawley for a violation of 18 U.S. C. § 241. Therefore, I dissent in part.

In asserting subject-matter jurisdiction under this general federal criminal law, the court not only disregards the longstanding federal policy of advancing tribal self-determination, but blatantly fails to apply circuit precedent.

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[33] Clark received a sentence of 46 months based upon an offense level of 22. Without a two-point enhancement for abuse of trust in the money laundering offense his offense level becomes 20. Upon resentencing, the guideline range changes from 41-51 months to 33-41 months.

Wadena received a sentence of 51 months based upon an offense level of 22. Without the two-point enhancement for breach of trust, his new offense level is 20. Upon resentencing, the guideline range changes from 41-51 months to 33-41 months.

[34] The court boldly cites United Stated v. Bledsoe, 674 F.2d 647, 655 (8th Cir. 1982), for the proposition that "[a]n indictment must reveal on its face a proper basis for joinder." Ante at 27-28. Notwithstanding the court's unfettered confidence in Bledsoe, this issue equally divided the court in United States v. Grey Bear, 863 F.2d 572 (8th Cir. 1988) (en banc) (5-5 decision) (stating that an indictment must reveal on its face a proper basis for joinder) (Lay, C.J., Heaney, McMillian, Richard S. Arnold, and Wollman, JJ., joining) (stating that propriety of joinder is not limited to the face of the indictment) (John R. Gibson, Fagg, Bowman, Magill, and Beam, JJ., joining). I agree with the court's conclusion here that any joinder error was harmless, but I do not agree with the unnecessary citation to Bledsoe, particularly when unaccompanied by an explanation.

We have held that "if a particular Indian right or policy is infringed by a general federal criminal law, that law will be held not to apply to Indians on reservations unless specifically so provided." United States v. Blue, 722 F.2d 383, 385 (8th Cir. 1983) (McMillian, J.). The right of tribal self-government has long been recognized and protected by both the courts, see, e.g., United States v. Kagama, 118 U.S. 375, 381-82 (1886), and Congress, see, e.g., 18 U.S.C. § 1152 (declaring that " [t]his section shall not extend to offenses committed by one Indian against the person or property of another Indian"). In my view, the exclusive right to prosecute members for fraud in a tribal election is a necessary and intimate aspect of tribal self-government. Federal prosecution of tribal election crimes will severely interfere with the tribes' ability, as separate sovereigns, to eradicate such corruption in their own elections and their own government. Until Congress specifically provides for jurisdiction over this type of internal tribal matter, we must avoid the paternalistic temptation to assert jurisdiction based on the subjective belief that federal intervention is the only way to protect the civil rights of tribal members.

Jurisdiction over a dispute arising on an Indian reservation "is governed by a complex patchwork of federal, state, and tribal law." Duro v. Reina, 495 U.S. 676, 680 n.1 (1990). Because Indian tribes pre-existed the Constitution, they "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." United States v. Wheeler, 435 U.S. 313, 323 (1978). One aspect of this retained sovereignty includes the power to "control their own internal relations," Duro, 495 U.S. at 685, which necessarily includes criminal "jurisdiction of all controversies between" tribal members, e.g., In re Mayfield, 141 U.S. 107, 115-16 (1891). Congress has broad powers to modify this retained sovereignty by conferring federal jurisdiction over crimes committed on

Indian reservations. See, e.g., Talton v. Mayes, 163 U.S. 376, 384 (1896). Thus, the question is whether Congress has provided jurisdiction for this federal prosecution.

The court correctly finds no basis for jurisdiction in the Indian Country Crimes Act and the Indian Major Crimes Act. See 18 U.S.C. §§ 1152 and 1153. Faced with congressional silence, however, the court turns to a general federal law, which by its terms applies to all persons. See 18 U.S.C. § 241. Section 241 provides that it is unlawful for two or more persons to "conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Id.

Assuming that Congress intended to include American Indians within the scope of laws which, by their terms, are applicable to all persons, we have applied general federal laws to tribal crimes. See, e.g., Stone v. United States, 506 F.2d 561, 563 (8th Cir. 1974). However, we have refused to extend this source of jurisdiction to purely internal tribal matters because that would intrude upon tribal sovereignty. See, e.g., United States v. White, 508 F.2d 453, 455 (8th Cir. 1974) (stating that "areas traditionally left to tribal self-government, those most often the subject of treaties, have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests"); see also Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law, 286 (1982 ed.) (stating that "the Supreme Court has consistently recognized the unique status of tribes, Indians, and their lands, and has required that the congressional purpose of a conflicting law clearly require that it apply to Indians before Indian rights are held implicitly infringed"). Thus, the question is whether prosecution under section 241 for tribal election fraud intrudes upon tribal self-government.

The court mischaracterizes this inquiry by looking to whether there is a tribal right to use the election system fraudulently in order to maintain a position of power. Ante at 24. Obviously, no such right exists. What the court fails to appreciate, however, is that the tribal right at issue is the exclusive right to prosecute tribal election offenses, which is necessary to maintain political integrity. See Montana v. United States, 450 U.S. 544, 566 (1981) (discussing the inherent tribal power to regulate activities that "threatens or has some direct effect on the political integrity ... of the tribe"). Intently focused on abating the corrupt actions of a few individuals, the court overlooks the important interest of the tribe in abating corruption within its own government. Monitoring tribal elections is an area traditionally left to tribal government and any contrary holding would violate the federal policy of respecting tribal sovereignty in the absence of express congressional authority.

Of course, Congress could remove this aspect of sovereignty and interject federal election policies and remedies into tribal elections. The wisdom of such a decision is best left to Congress, which is obviously better positioned to determine its potential impact. Rather than deferring to Congress, the court recklessly adopts a newly minted balancing test, not fairly supported as near as I can find anywhere within the recorded annals of American Indian litigation, weighing federal interests against tribal interests. See ante at 16. The result is a vague and incoherent test for jurisdiction. We should simply limit our inquiry to whether, on a case-by-case basis, the application of a general criminal law would infringe on tribal sovereignty. See Blue, 722 F.2d at 385.

I recognize that the oppression of tribal voting rights constitutes a fundamental assault on a democratic society and a serious violation of the civil rights of tribal members. Nonetheless, only Congress can remove this aspect of

sovereignty. Because Congress has not so acted, I would decline to assert jurisdiction over the election conspiracy offenses.

Even if we did have jurisdiction, I would disagree with the court's unprecedented extension of a federal election statute (18 U.S.C. § 241) to a tribal election. Although the Supreme Court has applied section 241 to a hybrid local and federal election, it did so because the conspirators used a voting machine to cast votes for both federal and local candidates. See Anderson v. United States, 417 U.S. 211, 225 (1974). The Court expressly declined to address whether section 241 would apply to a conspiracy to cast false votes in a local election that did not include any federal candidates. Id. at 228.

Similarly, we have applied section 241 to a local election, but only where the conspirators destroyed absentee ballots that also included votes that had been cast for federal candidates. See United States v. Townsley, 843 F.2d 1070, 1080 (8th Cir. 1988). Contrary to the court's reading of Townsley, see ante at 19-20, we have never endorsed the application of section 241 to purely local, much less tribal, elections. We cautioned that "we do not reach the question left undecided by the Supreme Court—whether 18 U.S.C. § 241 extends to conspiracies to cast votes in purely local elections in which no federal candidate is on the ballot." Townsley, 843 F.2d at 1080 n.10. If we were required to reach this issue, which I submit we are not, due to our lack of jurisdiction in the first instance, I would not extend section 241 to a tribal election. See Bathgate v. United States, 246 U.S. 220, 226 (1918) (discussing the congressional policy "not to interfere with elections within a State except by clear and specific provisions").

Accordingly, I respectfully dissent from Part III of the court's decision.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-4141MNST

United States of America, *

Appellee, *

vs. *

Darrell Chip Wadena, *

Appellant. *

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

No. 96-4145MNST

United States of America, *

Appellee, *

vs. *

Jerry Joseph Rawley, Jr., *

Appellant. *

No. 96-4146MNST

United States of America, *

Appellee, *

vs. *

	*
Rick Clark,	*
	*
Appellant.	*

The suggestion for rehearing en banc filed by Jerry Joseph Rawley, Jr. is denied. The petitions for rehearing filed by Jerry Joseph Rawley, Jr., Darrell Chip Wadena, and Rick Clark are denied.

August 27, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

STATUTES INVOLVED IN THIS CASE

Title 18 U.S.C. § 241 provides in pertinent part:

Conspiracy against rights. If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . [t]hey shall be fined under this title or imprisoned not more than ten years, or both . . . .

Title 18 U.S.C. § 1152 provides in pertinent part:

Laws governing. Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Title 18 U.S.C. § 1153 provides in pertinent part:

Offenses committed within Indian country. (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder,

assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Title 25 U.S.C. § 1302 provides:

Constitutional rights. No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witness against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [or] a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	
	)	**INDICTMENT**
Plaintiff,	)	
	)	(18 U.S.C. § 2)
v.	)	(18 U.S.C. § 241)
	)	(18 U.S.C. § 371)
DARRELL "CHIP" WADENA,	)	(18 U.S.C. § 666)
JERRY RAWLEY,	)	(18 U.S.C. § 1001)
RICK CLARK,	)	(18 U.S.C. §1163)
CARLEY JASKEN,	)	(18 U.S.C. § 1341)
HENRY HARPER, and	)	(18 U.S.C. § 1503)
PETER G. PEQUETTE, JR.,	)	(18 U.S.C. § 1957)
	)	
Defendants.	)	

THE UNITED STATES GRAND JURY CHARGES THAT:

INTRODUCTION

1. At all times relevant to this Indictment and as a part of and incorporated in every count of this Indictment as if it were realleged:

(a) The United States Department of Interior was an Agency of the United States.

(b) The Bureau of Indian Affairs was a part of the Department of Interior and was delegated the authority, under the direction of the Secretary of Interior, to manage the affairs and matters arising from the relations between the United States and Indians. Pursuant to Title 25, United States Code, Section 2, the Secretary of Interior is delegated the

authority to manage all Indian affairs and all matters arising out of Indian relations. In accordance with Title 25, United States Code, Section 13, the Bureau of Indian Affairs, under the supervision of the Secretary of Interior, is authorized to direct, supervise and expend such monies as Congress may appropriate for the benefit, care, and assistance of Indians in the United States.

(c) The Office of Inspector General, United States Department of Interior, under the general supervision of the Secretary of the Interior, is responsible for conducting and supervising audits and investigations relating to programs and operations of the Department of Interior. Special Agents of the Office of Inspector General are authorized to investigate violations of laws of the United States and the regulations of the Department of Interior, and they are authorized pursuant to Title 18, United States Code, Section 1510(c), to investigate violations of the criminal laws of the United States.

2. The White Earth Band of Chippewa Indians is an organized Indian tribe and tribal government on the White Earth Indian Reservation, in the State and District of Minnesota.

3. The White Earth Indian Reservation encompasses approximately 500,000 acres and has a total enrollment of nearly 20,000 members with 2,500 of those living on the White Earth reservation.

4. The White Earth Band of Chippewa Indians has received federal benefits in excess of $10,000.00 under a federal program involving grants, contracts, subsidies, loans, and guarantees during each of the calendar years relevant to this indictment, including the calendar year period beginning

January, 1990, through and including the year ending December 31, 1994.

5. In 1985 an agreement between the United States and the White Earth Indian tribe was reached which was called the White Earth Land Settlement Act (WELSA). The agreement required, among other things, the United States to appropriate $6,600,000.00 for the economic development of the tribe. A trust fund was established in the treasury of the United States known as the White Earth Economic Development and Tribal Government Fund.

6. The money was held in trust for the tribe of the White Earth Band of Chippewa Indians and was invested and managed by the Secretary of the Interior, through his designated representative, the Bureau of Indian Affairs (BIA).

7. On March 15, 1989, the White Earth Reservation Tribal Council (WERTC) approved ordinance no. 03-89, authorizing the BIA to continue its trust relationship and to invest WELSA funds until such time as the tribe submitted a financial ordinance plan to the Secretary of the Interior to transfer those funds for the purpose of making alternative investments.

8. On May 15, 1991, WERTC passed Resolution 016-91-015, as an amendment to ordinance no. 03-89, authorizing withdrawals of funds to be used for the construction of the Shooting Star Casino.

9. On March 23, 1992, the United States Department of the Interior, BIA, approved a 90% loan guaranty request from the White Earth Band of Chippewa Indians for a $5,500,000.00 loan obtained by the tribe through the First National Bank of Aitkin in Aitkin, Minnesota.

10. The loan guaranty provided additional funding for the construction, operation, and maintenance of the Shooting Star casino. In accordance with the loan agreement, the proceeds of the loan were deposited into an escrow account

maintained by Consolidated Abstract Company of Becker County, at the First National Bank of Detroit Lakes.

11. The White Earth Band of Chippewa Indians is governed by a Reservation Business - Committee, a/k/a Reservation Tribal Council comprised of a Tribal Chairman, Secretary/Treasurer and three additional district committee members, each of which is an agent of the Band. At all times relevant to this indictment, Darrell "Chip" Wadena was Tribal Chairman, Jerry Rawley was Secretary/Treasurer and Rick Clark was the District I Committeeman.

12. Tribal council members are elected to four year terms of office and must be enrolled members of the tribe who reside on the White Earth Indian Reservation.

COUNT 1

13. That from on or about April, 1991, and continuing through March, 1994, in the State and District of Minnesota, the defendants,

Darrell "Chip" Wadena,
Jerry Rawley,
and Rick Clark,

did knowingly and willfully combine, conspire, confederate, and agree together, and with other persons to the Grand Jury both known and unknown, to commit certain offenses against the United States, that is:

1) to violate Title 18, United States Code, Section 1163 (willful misapplication of tribal funds);

2) to violate Title 18, United States Code, Section 666 (theft, gratuities, bribery and misapplication concerning programs receiving federal funds).

OBJECT OF THE CONSPIRACY

14. It was the object of the conspiracy to use the White Earth Band of Chippewa Indians moneys, assets and credits through the misapplication of tribal funds for their personal gain in the construction of the Shooting Star Casino.

MEANS AND METHODS

15. It was a part of the conspiracy that Rick Clark sought to assure a personal gain as a result of the construction of the Shooting Star Casino (hereinafter referred to as "casino complex project").

16. It was further a part of the conspiracy that Darrell "Chip" Wadena positioned himself to personally gain and become enriched as a result of the casino complex project.

17. It was further a part of the conspiracy that Darrell "Chip" Wadena, as chairman of the WERTC, appointed Rick Clark as the tribal council's representative for the casino complex project's construction.

18. It was further a part of the conspiracy that Rick Clark, Darrell "Chip" Wadena and Jerry Rawley put Northern Drywall and Construction, Inc., into an advantageous position to receive the drywall and painting contract for the casino complex project.

19. Northern Drywall and Construction, Inc., had done work on only small construction projects prior to 1991.

20. On or about November, 1991, Shooting Star Casino Bid Package No. 12, which contained the specifications and drawings for the project, was completed by the Grand Forks, ND, architectural and engineering firm of EAPC. These specifications were provided to builder exchanges in Minnesota and North Dakota for review by contractors interested in bidding on the project.

21. The bids were handled by Gordon Construction, Inc., with an initial bid date for the drywall listed as December 13, 1991.

22. Mike LaDue, a White Earth tribal member, and an experienced owner of a competent drywall company from the Mahnomen, MN, area, was advised by a representative of Gordon Construction, Inc., prior to the actual bid opening date, that the drywall contract for Phase I of the project belonged to Northern Drywall and Construction, Inc.

23. It was further a part of the conspiracy that Rick Clark gave Darrell "Chip" Wadena a one-half ownership interest in Northern Drywall and Construction, Inc., before the casino complex project commenced.

24. It was further a part of the conspiracy that Rick Clark and Darrell "Chip" Wadena failed to disclose to other tribal council members, the architect on the project, or to the general contractor, Wadena's secret ownership interest in Northern Drywall and Construction, Inc.

25. It was further a part of the conspiracy that Rick Clark priced Northern Drywall and Construction, Inc., costs relating to the casino complex to assure significant profits to himself and Darrell "Chip" Wadena.

26. It was further a part of the conspiracy that Rick Clark, using Northern Drywall and Construction, Inc., caused to be made payments to himself, Wadena and Rawley with funds rightfully belonging to the White Earth Band of Chippewa Indians.

OVERT ACTS

27. In furtherance of the conspiracy and to effect the objects thereof, the conspirators committed the following overt acts:

28. In April, 1991, an agreement was signed by the WERTC with EAPC, an architectural firm from Grand Forks,

North Dakota, to build a casino complex in Mahnomen, Minnesota.

29. Prior to the awarding of the subcontract to Northern Drywall and Construction, Inc., Rick Clark entered into an agreement with WERTC Tribal Chairman Darrell "Chip" Wadena, resulting in Wadena becoming a 50% owner of the company. This information was unknown to other tribal members at the time of the appointment of Clark as the tribe's representative on the casino project.

30. No identifiable legitimate consideration was given by Wadena to Clark or Northern Drywall and Construction, Inc., for his interest in the company.

31. The stock certificates issued by Northern Drywall and Construction, Inc., were supposedly issued to Clark on March 8, 1988 and to Wadena on February 1, 1990.

32. However, the actual stock certificates for Northern Drywall and Construction, Inc., were not even received by the company until December, 1993.

33. WERTC representative Rick Clark was appointed by WERTC Chairman Darrell "Chip" Wadena, in early 1991 to serve as tribal representative for the casino construction project.

34. On July 5, 1991, WERTC enacted Tribal Resolution No. 001-02-013, approving Gordon Construction, Inc., as the general contractor for the building and completion of the gambling casino complex to be known as the Shooting Star Casino.

35. The initial phase of the casino project construction began in May, 1991.

36. In December, 1991, The Finishers Drywall, Inc. of Fargo, North Dakota, submitted a bid for the drywall for Phase I of the project which was approximately $40,000 less than the contract finally agreed to with Northern Drywall and Construction, Inc.

37. In January, 1992, Northern Drywall and Construction, Inc. signed a subcontract agreement with Gordon Construction, Inc. to complete Phase I of the drywall, insulation, and painting for the Shooting Star Casino, Lodge, Link and RV Buildings.

38. In October 1992, Northern Drywall and Construction, Inc., signed a subcontract agreement with Gordon Construction, Inc., to complete Phase II of the drywall, insulation, and painting for the Lodge II portion of the casino construction project.

39. In April 1993, Northern Drywall and Construction, Inc., signed a subcontract agreement with Gordon Construction, Inc., to complete the drywall, insulation, and painting for the Atrium and Buffet Additions of the casino construction project.

40. Between 1991 and December, 1993, Northern Drywall and Construction, Inc. received gross revenues of approximately $2,800,000.00, as payment for its effort on the casino complex project.

41. Between July, 1991 and December, 1993, Rick Clark, using Northern Drywall and Construction, Inc., gave Darrell "Chip" Wadena $428,682.60 from its profits.

42. On November 20, 1991, Rick Clark, via a Northern Drywall and Construction, Inc., check gave WERTC Secretary/Treasurer Jerry Rawley $1,500.

43. On July 15, 1992, Rick Clark, via a Northern Drywall and Construction, Inc., check, gave WERTC Secretary/Treasurer Jerry Rawley $15,000.

44. On March 19, 1993, Rick Clark, via a Northern Drywall and Construction, Inc., check gave WERTC Secretary/Treasurer Jerry Rawley $3,000.

45. On September 9, 1993, Rick Clark, via a Northern Drywall and Construction, Inc., check gave WERTC Secretary/Treasurer Jerry Rawley $2,000.

46. In November 1993, Northern Drywall and Construction, Inc., Shareholder and Board of Directors meeting minutes were prepared after the fact, for the years 1988 through 1993, in direct response to an audit notification by the Internal Revenue Service (IRS).

47. On or about February, 1993, Rick Clark phoned William Norris of Thunderbird Drywall Construction, Inc. of Minneapolis, Minnesota, and asked him to prepare after the fact inflated bid proposals for the entire casino project.

48. Clark advised Norris that he needed additional inflated bids in Gordon Construction Inc.'s files to make it appear that other drywall bids had been received by Gordon Construction, Inc.

49. In March 1993, Norris mailed the inflated, "after the fact" bid proposals to Rick Clark at his Lengby, MN, address.

50. Upon receipt of the bid proposals in March 1993, Rick Clark provided them to representatives of Gordon Construction, Inc., requesting that they be placed into Gordon Construction, Inc.'s bid proposal files.

51. On or about February, 1994, Clark asked Norris to destroy any copies of bid proposals that he had asked him to prepare because of the upcoming tribal elections.

All in violation of Title 18, United States Code, § 371.

COUNT 2

52. On or about July 15, 1992, in the State and District of Minnesota, the defendant,

RICK CLARK,

did knowingly and corruptly give, offer, or agree to give something of value, that is $15,000.00, to Jerry Rawley, an agent of the White Earth Band of Chippewa Indians, with intent to influence or reward him in connection with the

business, transaction, or series of transactions of said tribal government involving something of value of $5,000.00 or more; all in violation of Title 18, United States Code, Section 666(a)(2).

COUNT 3

53. On or about July 15, 1992, in the State and District of Minnesota, the defendant,

JERRY RAWLEY,

did knowingly and corruptly solicit, demand, accept, and agree to accept something of value, that is $15,000.00, from Rick Clark, an agent of the White Earth Band of Chippewa Indians, intending to be influenced or rewarded in connection with a business, transaction, or series of transactions of said tribal government involving something of value of $5,000.00 or more; all in violation of Title 18, United States Code, Section 666(a)(1)(B).

COUNT 4

54. On or about July 15, 1992, in the State and District of Minnesota, the defendants,

RICK CLARK,
and JERRY RAWLEY,

did knowingly engage and attempt to engage in a monetary transaction by, through, and to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000.00, that is, the negotiation of Northern Drywall and Constructions, Inc. check no. 3657 for $15,000.00, such property having been derived from a

specified unlawful activity, that is 18 U.S.C. § 666; all in violation of Title 18, United States Code, Sections 1957 and 2.

COUNT 5

55. On or about December, 1993, in the State and District of Minnesota, the defendant,

DARRELL "CHIP" WADENA,

did knowingly and corruptly solicit, demand, accept, and agree to accept something of value, that is, stock, from Rick Clark, an agent of the White Earth Band of Chippewa Indians, intending to be influenced or rewarded in connection with a business, transaction, or series of transactions or said tribal government involving something of value of $5,000.00 or more; all in violation of Title 18, United States Code, Section 666(a)(1)(B).

COUNT 6

56. On or December, 1993, in the State and District of Minnesota, the defendant,

RICK CLARK,

did knowingly and corruptly give, offer, or agree to give something of value, that is, stock, to Darrell "Chip" Wadena, an agent of the White Earth Band of Chippewa Indians, with intent to influence or reward him in connection with the business, transaction, or series of transactions of said tribal government involving something of value of $5,000.00 or more; all in violation of Title 18, United States Code, Section 666(a)(2).

COUNT 7

57. From on or about February, 1991, through December, 1993, in the State and District of Minnesota, the defendant,

DARRELL "CHIP" WADENA,

did knowingly and corruptly solicit, demand, accept, and agree to accept something of value, that is, $428,682.50, from Rick Clark, an agent of the White Earth Band of Chippewa Indians, intending to be influenced or rewarded in connection with a business, transaction, or series of transactions or said tribal government involving something of value of $5,000.00 or more; all in violation of Title 18, United States Code, Section 666 (a) (1) (B).

COUNT 8

58. From on or about February, 1991, through December, 1993, in the State and District of Minnesota, the defendant,

RICK CLARK,

did knowingly and corruptly give, offer, or agree to give something of value, that is, $428,682.50, to Darrell "Chip" Wadena, an agent of the White Earth Band of Chippewa Indians, with intent to influence or reward him in connection with the business, transaction, or series of transactions of said tribal government involving something of value of $5,000.00 or more; all in violation of Title 18, United States Code, Section 666 (a) (2).

COUNT 9

59. on or about March 1, 1993, in the State and District of Minnesota, the defendant,

RICK CLARK,

devised a scheme to defraud the White Earth Band of Chippewa Indians of property, that is, money to be made for the subcontracting of construction of the Shooting Star Casino, by means of false and fraudulent pretenses, representations and concealment of material facts by causing to be placed in the United States mail, fictitious bids for construction, to be sent and delivered according to the directions thereon by the United States Postal Service, to the addressee; all in violation of Title 18, United States Code, Section 1341.

COUNTS 10 - 18

60. From on or about February, 1991, through December, 1993, in the State and District of Minnesota, the defendants,

DARRELL "CHIP" WADENA
and RICK CLARK,

as set forth below, did knowingly engage and attempt to engage in a monetary transaction by, through, and to a financial institution affecting interstate commerce, in criminally derived property greater than $10,000.00, that is the negotiation of Northern Drywall and Construction, Inc. checks in the amounts listed below, such property having been derived from a specified unlawful activity, namely Title

18, United States Code, Section 666; all in violation of Title 18, United States Code, Sections 1957 and 2.

Count	Date	Amount	Transaction
10	September 30, 1991	$17,423.50	Deposited First National Bank of Detroit Lakes, MN
11	October 8, 1991	$18,253.00	Deposited Farmers State Bank of Winger, MN
12	November 4, 1991	$18,864.00	Deposited Farmers State Bank of Winger, MN
13	December 20, 1991	$25,000.00	Deposited First National Bank of Detroit Lakes, MN
14	February 10, 1992	$17,425.00	Deposited First National Bank of Detroit Lakes, MN
15	May 23, 1992	$20,205.00	Deposited Farmers State Bank of Winger, MN
16	October 2, 1992	$14,710.00	Deposited Farmers State Bank of Winger, MN
17	October 23, 1992	$14,710.00	Deposited Farmers State Bank of Winger, MN

18	March 4, 1993	$10,102.00	Deposited Farmers State Bank of Winger, MN

COUNT 19

61. That from on or about April, 1991, and continuing through March, 1994, in the State and District of Minnesota, the defendants,

Darrell "Chip" Wadena,
Jerry Rawley,
and Rick Clark,

did knowingly and willfully combine, conspire, confederate, and agree together, and with other persons to the Grand Jury both known and unknown, to commit certain offenses against the United States, that is: to violate Title 18, United States Code, Section 1163 (willful misapplication of tribal funds);

OBJECT OF THE CONSPIRACY

62. It was the object of the conspiracy to misapply the moneys, funds and assets of the White Earth Band of Chippewa Indians in the form of commission payments and benefits to the defendants' own use or the use of others for their personal gain.

MEANS AND METHODS

63. It was further a part of the conspiracy that Rick Clark, Darrell "Chip" Wadena, Jerry Rawley and others known and unknown to the Grand Jury misapplied funds belonging to the White Earth Band of Chippewa Indians by

designating certain personal expenditures as legitimate gaming commission payments.

64. It was further a part of the conspiracy that Rick Clark, Darrell "Chip" Wadena, Jerry Rawley and others known and unknown to the grand jury, misapplied funds belonging to the White Earth Band of Chippewa Indians, by forming a fishing commission in 1993, appointing themselves to that commission, and subsequently paying themselves exorbitant commissions, salaries and benefits, all of which were exempted from federal income taxes, knowing that the fishing commission was created solely as a vehicle to exempt income from federal taxes and did not serve a legitimate purpose or benefit the general welfare of the tribal membership.

OVERT ACTS

65. On or about June, 1993, the WERTC created a fishing commission and appointed themselves as its commissioners.

66. The fishing commission was created to take advantage of IRS rules allowing tax benefits related to income derived from fishing related activities but no additional responsibilities were placed on the WERTC.

67. The council approved a fishing commission payment of between approximately $65,000 and $75,000 per member. For 1993, Darrell "Chip" Wadena received $37,500, Jerry Rawley received $35,000, Rick Clark received $32,500, all of which was ultimately exempted from federal income taxes.

68. The tribal biologist, who is directly responsible for fishing related issues, was kept unaware of the fishing commission's existence or its purpose.

69. The tribal conservation officer, who is directly responsible for upholding regulations of all matters within the White Earth Reservation pertaining to hunting and fishing,

was kept unaware of the fishing commission's existence or its purpose.

70. On April 7, 1993, White Earth Reservation Business Committee Check No. 34114, in the amount of $3,125.00 was made payable to Ogema State Bank, Ogema, MN. The check was subsequently cashed at Ogema State Bank, and the proceeds wire transferred from Mahnomen, Minnesota to Las Vegas, Nevada, to Jerry Rawley. The check payment was coded as a gaming commission payment.

71. On March 15, 1993, White Earth Reservation Business Committee Check No. 37132, in the amount of $10,000.00 was made payable to the First National Bank of Mahnomen. The tribe's accounting records show this payment as a gaming commission payment on behalf of Darrell "Chip" Wadena that was used to make a principal and interest payment on his 1992 Cadillac automobile loan.

72. On December 11, 1992, White Earth Reservation Business Committee Check No. 32171, in the amount of $5,500.00, was made payable to Swenson's Equipment and Sales, Oklee, MN. The check was issued on behalf of Rick Clark for the purchase of a 1993 Polaris snowmobile. This check was coded as a gaming commission payment.

73. On December 10, 1992, White Earth Reservation Business Committee Check No. 32153, in the amount of $12,474.00, was made payable to Jack Starkey Polaris, Mahnomen, MN. Approximately $4,000.00 of this amount was used by Darrell "Chip" Wadena to purchase a 1993 Polaris snowmobile. This check was coded as a gaming commission payment.

74. On December 10, 1992, White Earth Reservation Business Committee Check No. 32152, in the amount of $5,000.00, was made payable to Jack Hausner, Mahnomen, MN. The check was issued on behalf of Jerry Rawley from the gaming commission and was used to

purchase a 1993 Kawasaki 4X4 all terrain vehicle and a 60" hydraulic snow plow.

75. On or about March 24, 1993, Jerry Rawley received White Earth Reservation Business Committee check no. 33878, in the amount of $31,000.00, which was received by him as a gaming commission payment when in truth and fact he requested said amount to make a payment to the Internal Revenue Service for $29,604.00.

76. Darrell "Chip" Wadena received $58,400 as White Earth Band of Chippewa Indians' gaming commission payments and total payments of $258,559.00 during 1993. Jerry Rawley received approximately $51,000 as White Earth Band of Chippewa Indians' gaming commission payments and total payments of $205,058.00 in 1993. Rick Clark received approximately $55,000 as White Earth Band of Chippewa Indians' gaming commission payments and total payments of $221,525.00 during 1993.

All in violation of Title 18, United States Code, Section 371.

COUNT 20

77. On or about December 10, 1992, in the State and District of Minnesota, the defendant,

JERRY RAWLEY,

did knowingly and willfully embezzle, steal, convert to his use and the use of others, willfully misapply, and willfully permit to be misapplied, money, funds, credits, goods, assets and property belonging to the White Earth Band of Chippewa Indians, an Indian tribal organization, or entrusted to the custody or care of an officer, employee or agent of said tribal organization, to wit: a White Earth Band of Chippewa Indian General Fund check in the amount of $5,000.00 for the

purchase of a 1993 Kawasaki 4X4 ATV and 60" hydraulic snow plow for the benefit of defendant Rawley; all in violation of Title 18, United States Code, Section 1163.

COUNT 21

78. On or about December 11, 1992, in the State and District of Minnesota, the defendant,

RICK CLARK,

did knowingly and willfully embezzle, steal, convert to his use and the use of others, willfully misapply, and willfully permit to be misapplied, money, funds, credits, goods, assets and property belonging to the White Earth Band of Chippewa Indians, an Indian tribal organization, or entrusted to the custody or care of an officer, employee or agent of the White Earth Band of Chippewa Indians, to wit: a White Earth Band of Chippewa Indian General Fund Check in the amount of $5,500.00 for the purchase of a 1993 Polaris Snowmobile for the benefit of defendant Clark; all in violation of Title 18, United States Code, Section 1163.

COUNT 22

79. On or about March 16, 1993, in the State and District of Minnesota, the defendant,

DARRELL "CHIP" WADENA,

did knowingly and willfully embezzle, steal, convert to his use and the use of others, willfully misapply, and willfully permit to be misapplied, money, funds, credits, goods, assets and property belonging to the White Earth Band of Chippewa Indians, an Indian tribal organization, or entrusted to the

custody or care of an officer, employee or agent of the White Earth Band of Chippewa Indians, to wit: a White Earth Band of Chippewa Indian General Fund Check in the amount of $10,000.00 for a principal and interest payment on a 1992 Cadillac loan for the benefit of defendant Wadena; all in violation of Title 18, United States Code, Section 1163.

COUNT 23

80. On or about December 17, 1993, in the State and District of Minnesota, the defendant,

JERRY RAWLEY,

did knowingly and willfully embezzle, steal, convert to his use and the use of others, willfully misapply, and willfully permit to be misapplied, money, funds, credits, assets and property belonging to the White Earth Band of Chippewa Indians, an Indian tribal organization, or entrusted to the care of custody of an officer, employee or agent of said tribal organization, to wit: a gross salary payment of $25,000.00, for the benefit of defendant Rawley; all in violation of Title 18, United States Code, Section 1163.

COUNT 24

81. On or about December 17, 1993, in the State and District of Minnesota, the defendant,

DARRELL "CHIP" WADENA,

did knowingly and willfully embezzle, steal, convert to his use and the use of others, willfully misapply, and willfully permit to be misapplied, money, funds, credits, assets and property belonging to the White Earth Band of Chippewa

Indians, an Indian tribal organization, or entrusted to the care of custody of an officer, employee or agent of said tribal organization, to wit: a gross salary payment of $56,705.00, for the benefit of defendant Wadena; all in violation of Title 18, United States Code, Section 1163.

COUNT 25

82. On or about December 17, 1993, in the State and District of Minnesota, the defendant,

RICK CLARK,

did knowingly and willfully embezzle, steal, convert to his use and the use of others, willfully misapply, and willfully permit to be misapplied, money, funds, credits, assets and property belonging to the White Earth Band of Chippewa Indians, an Indian tribal organization, or entrusted to the care of custody of an officer, employee or agent of said tribal organization, to wit: a gross salary payment of $54,500.00, for the benefit of defendant Clark; all in violation of Title 18, United States Code, Section 1163.

COUNT 26

83. On or about March 24, 1993, in the State and District of Minnesota, the defendant,

JERRY RAWLEY,

did knowingly convert to his use or the use of another, willfully misapply, and willfully permit to be misapplied, monies, funds, credits, goods, assets and property belonging to the White Earth Band of Chippewa Indians, an Indian tribal organization, or entrusted to the custody or care of an officer,

employee or agent of said tribal organization; to wit: a White Earth Band of Chippewa Indian General Fund check no. 33878 for $31,000.00; all in violation of Title 18, United States Code, Section 1163.

COUNT 27

84. On or about March 24, 1993, in the State and District of Minnesota, the defendant,

JERRY RAWLEY,

being an agent of an Indian tribal government, obtained by fraud and intentionally misapplied, property worth at least $5,000.00, that is White Earth Band of Chippewa Indian check no. 33878, for $31,000.00, and owned by, under the care and custody of said tribal organization; all in violation of Title 18, United States Code, Section 666.

COUNT 28

85. On or about March 24, 1993, in the State and District of Minnesota, the defendant,

JERRY RAWLEY,

did knowingly engage and attempt to engage in a monetary transaction by, through, and to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000.00, that is, the negotiation of check no. 33878 for $31,000.00, such property having been derived from a specified unlawful activity, that is 18 U.S.C. § 666; all in violation of Title 18, United States Code, Section 1957.

ELECTION FRAUD BACKGROUND

86. The election of the tribal council is governed by Article IV, Section I of the Revised Constitution and By-laws of the Minnesota Chippewa Tribe approved by the Secretary of the Interior.

87. The White Earth Reservation, pursuant to the laws of the United States and the election ordinance of the Minnesota Chippewa Tribe, held a general election for the offices of Secretary/Treasurer, and District I and II Committeemen on June 14, 1994. The candidates were expected to serve the White Earth tribal members in Minnesota.

88. A White Earth General Reservation Election Board (GREB) consisting of at least three eligible voters is appointed by the tribal council. The GREB is responsible for assuring that elections are held in accordance with the Minnesota Chippewa Tribe Election Ordinance #5.

89. On June 14, 1994, many of the enrolled members of the White Earth Reservation were duly registered as voters and possessed the necessary requisite qualifications as provided by law to entitle them to vote in the general election on that day, for the candidates referred to in paragraph 87. Many of these persons duly voted for a candidate for the position, and their votes were certified and counted as part of the total number of votes cast for such candidates at such election. These voters will hereinafter be referred to as eligible voters.

90. Each of the eligible voters possessed the right and privilege guaranteed and secured by the constitution and the laws of the United States and the Constitution and Bylaws of Minnesota Chippewa Tribe, the representative Chippewa tribal organization for the White Earth Band, to vote at said election for the candidate for the offices described above, and the further right and privilege to have each of their votes recorded, counted and given full effect, that is to say, that the

value and effect of each of their votes and expressions of choice should not be impaired, lessened, diminished, diluted or destroyed by illegal votes falsely or fraudulently cast, counted, recorded and certified.

91. At all times relevant to this indictment the GREB consisted of an election judge, clerk and teller.

92. At all times relevant to this indictment Carley Jasken was the GREB Judge.

ABSENTEE BALLOT VOTING

93. Eligible voters are also allowed to cast votes by absentee ballots whenever, due to absence from the reservation, illness or physical disability, the individual is not able to vote at the polls.

94. To cast an absentee ballot for district committeeman, an eligible voter must have resided within the respective district for a period of at least thirty (30) days at the voter's last reservation residence. In the event an eligible voter has never resided on the reservation, that person must declare by affidavit the district in which to vote for district representative. All eligible voters are entitled to cast a ballot for the position of Secretary/Treasurer.

95. The GREB is required to give or mail ballots for absentee voting to eligible voters upon receipt of a written request from the voter. An eligible voter who requests and receives an absentee ballot in person is required to cast the ballot with GREB on the same day.

96. Documents which are required to be given or mailed to the eligible voter requesting an absentee ballot include: (a) the absentee ballot; (b) an inner envelope, bearing on the outside the words "Absentee Ballot"; and (c) a pre-addressed outer envelope which on the reverse side appears an affidavit reading as follows:

I, _____, do solemnly swear that I am an enrolled member of the Minnesota Chippewa Tribe; that I will be at least eighteen years of age on the election date and am entitled to vote in the election to be held on _____, 19__, and that I cannot appear at the polling place on the reservation on the date of the election; and that I resided within District _____ for at least thirty (30) days as my last reservation residence. (Alternative Sentence) I have never resided upon _____ Reservation wherein I am enrolled. For absentee balloting purposes, I select the _____ District as the district in which I will cast my ballot for Committeeman.

Signed: _____(Voter)_____

Subscribed and sworn to before me this ___day of _____, 19___, and I hereby certify that the affiant properly identified himself/herself to me, exhibited the ballot to be unmarked; that he/she then in my presence and in the presence of no other person, and in such a manner that I could not see his vote, marked such ballot and enclosed and sealed the same in the envelope marked "Absentee Ballot."

Signed:_____ (SEAL)
Title:_____

97. The voter is directed to subscribe to the "affidavit" before a notary public and in the presence of such notary and no other person and fold so as to conceal the marking on the ballot, place the ballot in the envelope marked "Absentee Ballot" and seal that envelope.

98. GREB is required to make and keep a record of the date a request for absentee ballot is received, the date the ballot was mailed, to whom mailed, the address where the ballot was mailed, the date of return of such ballot and from whom the returned ballot was received.

99. Jerry Rawley was the incumbent candidate for the four year term of Secretary/Treasurer.

100. Rick Clark was the unopposed incumbent candidate for the four year term of Committeeman for District No. 1.

101. The election was held on June 14, 1994. Rick Clark and Jerry Rawley were determined the winners of their respective positions on June 15, 1994, by the GREB.

102. On June 20, 1994, Dan Stevens, a candidate for the position of Secretary/Treasurer and a former member of the tribal council, filed a Notice of Protest alleging illegality in said election.

103. Following the Notice of Protest, a Special Election Review Board was convened to review the allegations of illegality in the June 14, 1994 election.

104. On August 10, 1994 the Special Election Review Board submitted its report. The report indicated findings of numerous irregularities, including more than 340 absentee ballots cast where there was no record of those ballots being sent to the alleged voter.

105. Jerry Rawley was sworn in as the Secretary/Treasurer for the White Earth Band of Chippewa Indians Tribal Council in October 1994. Rick Clark was certified as the District I Committeeman on June 15, 1994, by the GREB.

COUNT 29

106. From on or about January 1, 1990, to on or about September 30, 1994, the defendants,

JERRY RAWLEY,
RICK CLARK,
CARLEY JASKEN,
PETER PEQUETTE, JR.,
and HENRY HARPER,

did unlawfully, willfully and knowingly combine, conspire, confederate and agree with each other and with other persons known and unknown to the grand jury, and with other persons to injure and oppress the aforesaid voters in the free exercise and enjoyment of certain rights and privileges secured to each of them by the constitution and laws of the United States and the Constitution and Bylaws of the Minnesota Chippewa Tribe, to wit:

a. The right guaranteed to said eligible voters in the aforesaid election under the United States Constitution and Article XIII of the Minnesota Chippewa Tribe Constitution to have their votes in the election for the candidate of their choice for the above described office cast and tabulated fairly and free from dilution by ballots illegally and improperly cast.

b. The right guaranteed to said eligible voters by and under the equal protection clause of the Indian Civil Rights Act of 1968, 25 United States Code, Section 1301, et seq., to have their votes in the election cast and tabulated fairly and free from dilution by ballots illegally and improperly cast and tabulated.

107. The object of this conspiracy, among other things, was to secure the election of candidates supported by the defendants, by causing judges of the election to corruptly discharge their official duties in the management of the polling place, and cause ballots to be fraudulently and illegally cast in the names of persons who did not vote.

108. It was a part of such conspiracy that defendants would cause, permit and attempt to cause absentee ballots to be cast, by procedures and methods in violation of the Minnesota Chippewa Tribe Election Ordinance 15, and the defendants would permit, cause and attempt to cause fraudulent and illegal votes to be cast, all with the purpose and intent that said illegal and fraudulent absentee ballots would be counted, returned and certified as part of the total votes cast for candidates for said election, thereby impairing, lessening, diminishing, diluting and destroying the value and effect of votes legally, properly and honestly cast for candidates in said election.

109. It was a. further part of the conspiracy that the conspirators committed the following acts:

110. On or about 1986, Carley Jasken became the Election Judge for the White Earth Band of Chippewa Indians General Election Board (GREB).

111. Rick Clark ran as an incumbent for District I Committeeman in the June 14, 1994 election of the White Earth Band of Chippewa Indians.

112. Jerry Rawley ran as an incumbent for Secretary/Treasurer of the White Earth Band of Chippewa Indians' June 14, 1994 election.

113. In August, 1992 tribal council members appointed Carley Jasken as Assistance Coordinator, whose function included the supervision of assistance payments to tribal members.

114. During the September, 1990 re-election for the position of Secretary/Treasurer, Carley Jasken requested fictitious ballots be prepared by persons known and unknown to the Grand Jury.

115. During the September, 1990 re-election, Jerry Rawley gave an official voter list to persons known and unknown to the Grand Jury for the purpose of completing fictitious absentee ballots.

116. From on or about January through June, 1994, Jerry Rawley caused to be paid, from the White Earth Band of Chippewa Indians General Fund, money, disguised as assistance payments, to various individuals to obtain request cards and absentee ballots for himself during the June 14, 1994 election.

117. From on or about January through June, 1994, Rick Clark caused to be paid, from the White Earth Band of Chippewa Indians General Fund, money, disguised as assistance payments, to various individuals to obtain request cards and absentee ballots for himself and Jerry Rawley during the June 14, 1994 election.

118. On or about April, 1994, Carley Jasken requested of a person known to the grand jury to complete requests for absentee ballots on behalf of that person and her relatives. Said person completed the request but the individual and the persons of whom absentee ballots were requested did not vote. Absentee ballots, however, were notarized and cast in their names for the June 14, 1994 election.

119. On or about June 14, 1994, Rick Clark caused to be cast approximately 50 absentee ballots in other voters' names.

120. On or about May 25, 1994, Peter Pequette illegally notarized approximately 72 affidavit envelopes, each containing a completed absentee ballot, that he knew would be and were subsequently cast in the June 14, 1994 election. These affidavit envelopes were brought to him by Jerry Rawley.

121. On or about May 25, 1994, persons known and unknown to the Grand Jury illegally notarized approximately 96 affidavit envelopes, each containing a completed absentee ballot that the person knew would be and were subsequently cast in the June 14, 1994 election. These affidavit envelopes were brought to that person by Jerry Rawley.

122. On or about June 8, 1994, persons known and unknown to the Grand Jury illegally notarized approximately

37 affidavit envelopes, each containing a completed absentee ballot that the person knew would be and were subsequently cast in the June 14, 1994 election. These affidavit envelopes were brought to that person by Rick Clark.

123. On or about June 10, 1994, Henry Harper illegally notarized approximately 103 affidavit envelopes, each containing a completed absentee ballot, that he knew would be and were cast in the June 14, 1994 election.

124. On or about September 23, 1994, Carley Jasken caused to be shredded documents evidencing the corrupt and fraudulent practices involved in the June 14, 1994 election.

All in violation of Title 18, United States Code, Section 241.

COUNT 30

125. From on or about January 1, 1994, through June 14, 1994, in the State and District of Minnesota, the defendant,

RICK CLARK,

did knowingly and willfully embezzle, steal, convert to his use and the use of others, willfully misapply, and willfully permit to be misapplied, money, funds, credits, goods, assets and property belonging to the White Earth Band of Chippewa Indians, an Indian tribal organization, or entrusted to the custody or care of an officer, employee or agent of the White Earth Band of Chippewa Indians, that is, during the June 14, 1994, White Earth General Election, the defendant corruptly authorized the payment of tribal funds, disguised as tribal assistance payments, to assist the above named in maintaining his elected position as District I Committeeman and the position of others; all in violation of Title 18, United States Code, Section 1163.

COUNT 31

126. From on or about January 1, 1994, through June 14, 1994, in the State and District of Minnesota, the defendant,

JERRY RAWLEY,

did knowingly and willfully embezzle, steal, convert to his use and the use of others, willfully misapply, and willfully permit to be misapplied, money, funds, credits, goods, assets and property belonging to the White Earth Band of Chippewa Indians, an Indian tribal organization, or entrusted to the custody or care of an officer, employee or agent of the White Earth Band of Chippewa Indians, that is, during the June 14, 1994, White Earth General Election, the defendant corruptly authorized the payment of tribal funds, disguised as tribal assistance payments, to assist the above named in maintaining his elected position as Secretary/Treasurer; all in violation of Title 18, United States Code, Section 1163.

MAIL FRAUD
SCHEME TO DEFRAUD

127. The allegations contained in paragraphs 86 through 126 of this indictment are realleged as though fully set forth herein.

128. From on or about September, 1990, through October 30, 1994, in the State and District of Minnesota, the defendants described below and their co-schemers knowingly and intentionally devised a scheme and artifice to defraud the voters and enrolled members of the White Earth Band of Chippewa Indians of the exclusive right to determine who would receive the salary and emoluments of tribal council membership.

PURPOSE OF THE SCHEME TO DEFRAUD

129. It was a part of the plan and purpose of the scheme and artifice to determine the outcome of the election for Secretary/Treasurer of the White Earth Band of Chippewa Indians.

OBJECT OF SCHEME

130. The object of the scheme and artifice to defraud was to obtain for the offices of tribal council members the salary and benefits of that office through the procurement, casting and tabulation of illegal ballots.

131. It was further a part of the scheme and artifice to defraud to deprive the citizens and tribal voters of the White Earth Band of Chippewa Indians of influence over how the tribe's monies were to be allocated with respect to the salary, expenses and benefits of Secretary/Treasurer.

SCHEME TO DEFRAUD

132. It was a further part of the scheme and artifice that defendants and others known and unknown to the grand jury solicited and collected fictitious ballots and voted those ballots in the June 14, 1994 election.

133. It was a further part of the scheme and artifice that defendants and others known and unknown to the grand jury attempted to influence the outcome of the White Earth Band of Chippewa Indians election on June 14, 1994, by mailing and causing to be mailed absentee ballots which had been fraudulently obtained and voted, and which were intended to be counted and tabulated by GREB as legitimate ballots cast in that election.

134. It was further a part of the scheme and artifice to defraud that during the election of tribal council members

persons both known and unknown to the Grand Jury helped to complete fictitious absentee ballots by signing and notarizing them.

135. It was further a part of the scheme and artifice to defraud that Rick Clark, Jerry Rawley and others authorized the payment of tribal funds, disguised as assistance payments, to various persons known and unknown to the Grand Jury in exchange for their assistance in distributing and collecting request cards, and collecting affidavit absentee ballots for the June 14, 1994 election.

136. It was further a part of the scheme and artifice to defraud that Rick Clark prepared absentee ballots by signing the names of other legitimate voters who did not vote.

137. It was further a part of the scheme and artifice to defraud that Jerry Rawley and Rick Clark, with the assistance of others known and unknown to the Grand Jury, caused to be notarized for mailing, absentee ballots of persons who did not vote.

COUNTS 32 - 41

138. It was part of the scheme and artifice to defraud and obtain money and other valuable property by means of false and fraudulent pretenses, representations, promises and concealment of material facts by the defendants as set forth below, for the purpose of executing, and attempting to execute the scheme and artifice to defraud did by placing in a post office and authorized depository mail, as set forth:

Counts	Name of Defendant	Name of Affiant	Mailing Location	Approx. Date of Mailing
32	Rick Clark and Henry Harper	Carol Villebrun	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 6/10/94
33	Rick Clark and Henry Harper	Kenneth Arthur	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 6/10/94
34	Rick Clark	Marvin E. Lundquist	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 6/14/94
35	Jerry Rawley and Henry Harper	Phyllis Torgerson	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 6/10/94
36	Jerry Rawley and Peter G. Pequette, Jr.	Tracey Marie Engelke	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 5/25/94
37	Jerry Rawley	Karen Berg	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 5/25/94
38	Jerry Rawley and Peter G. Pequette, Jr.	Lois J. McCloskey	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 5/25/94
39	Jerry Rawley and Peter G. Pequette, Jr.	George Ross	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 5/25/94
40	Jerry Rawley and Peter G. Pequette, Jr.	Robert A. Sweet	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 5/25/94
41	Jerry Rawley and Peter G. Pequette, Jr.	LaVern Fairbanks	Election Office White Earth Reservation General Election Office P.O. Box 420 Mahnomen, MN 56557	On or about 5/25/94

all in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 42

139. On or about September 15, 1994, in the State and District of Minnesota, in a matter within the jurisdiction of the Department of Interior, the defendant,

HENRY HARPER,

did knowingly and willfully make a false, fraudulent, and fictitious material statement and representation; that is, the defendant stated to a Special Agent for the Department of the Interior that he had notarized absentee ballots only on persons in his presence for the June 14, 1994 tribal council election for the White Earth Band of Chippewa Indians, when in truth and in fact, defendant then and there well knew that he had notarized numerous absentee ballots of voters who had not appeared in his presence and marked official absentee ballots, all in violation of Title 18, United States Code, Section 1001.

COUNT 43

140. On or about September 14, 1994, in the State and District of Minnesota, in a matter within the jurisdiction of the Department of Interior, the defendant,

PETER PEQUETTE JR.,

did knowingly and willfully make a false, fraudulent, and fictitious material statement and representation; that is, the defendant stated to a Special Agent for the Department of the Interior that he had notarized absentee ballots only on persons in his presence for the June 14, 1994 tribal council election for the White Earth Band of Chippewa Indians, when in truth and in fact, defendant then and there well knew that he had notarized numerous absentee ballots of voters who had not

appeared in his presence and marked official absentee ballots, all in violation of Title 18, United States Code, Section 1001.

COUNT 44

On or about September 23, 1994, in the State and District of Minnesota, the defendant,

CARLEY JASKEN,

did corruptly obstruct, impede and endeavor to cause to obstruct and impede, the due administration of justice in the execution of a grand jury subpoena and related criminal investigation by shredding and causing to be shredded documents which were the subject of the subpoena and criminal investigation, all in violation of Title 18, United States Code, Sections 1503 and 2.

A TRUE BILL

UNITED STATES ATTORNEY FOREPERSON

Supreme Court, U.S.
FILED
MAR 8 1999
CLERK

(2)

Nos. 98-876, 98-7027 and 98-7069

In the Supreme Court of the United States

OCTOBER TERM, 1998

RICK CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

DARRELL CHIP WADENA, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY JOSEPH RAWLEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal criminal laws of general applicability may apply in Indian country when both the perpetrator and victim are Indians.

2. Whether 18 U.S.C. 241 may apply to conspiracies to commit vote fraud in a tribal election.

3. Whether the district court committed reversible error in informing the jury that the White Earth Band of Chippewa Indians is an "Indian tribal organization," for purposes of 18 U.S.C. 1163, and an "Indian tribal government" for purposes of 18 U.S.C. 666.

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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Clark Pet. App. A54-A107) is reported at 152 F.3d 831.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1998 (Clark Pet. App. A53). A petition for rehearing was denied on August 27, 1998 (Clark Pet. App.

A108-A109). The petition for a writ of certiorari in No. 98-7027 was filed on November 24, 1998. The petitions for a writ of certiorari in No. 98-876 and No. 98-7069 were filed on November 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioners Darrell Chip Wadena, Rick Clark, and Jerry Joseph Rawley, Jr., were convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and multiple counts of theft or bribery involving programs receiving federal funds, in violation of 18 U.S.C. 666; money laundering, in violation of 18 U.S.C. 1957; and willful misapplication of tribal funds, in violation of 18 U.S.C. 1163 (1994). Clark and Rawley were also convicted on one count of conspiracy to oppress the free exercise of federal rights, in violation of 18 U.S.C. 241 (1994), and multiple counts of mail fraud, in violation of 18 U.S.C. 1341. Clark Pet. App. A43, A55; Wadena Pet. App. A95; Rawley Judgment 1.

Wadena was sentenced to concurrent terms of 51 months' imprisonment on each of the 15 counts on which he was convicted. Clark was sentenced to concurrent terms of 46 months' imprisonment on each of the 22 counts on which he was convicted. Rawley was sentenced to concurrent terms of 37 months' imprisonment on each of the 17 counts on which he was convicted. Each petitioner's sentence was to be followed by three years' supervised release. Each petitioner was ordered to pay restitution, a fine, and a special assessment. Clark Pet. App. A43-A51, A55-A56 n.1; Gov't C.A. Br. 2.

The court of appeals affirmed petitioners' convictions but remanded for resentencing. Clark Pet. App. A102. On remand, the district court sentenced Wadena to concurrent terms of 33 months' imprisonment, Clark to concurrent terms of 21 months' imprisonment, and Rawley to con-

current terms of 30 months' imprisonment. Clark Pet. 2; Wadena Pet. App. A96; Rawley Judgment 3.

1. Petitioners are members of the White Earth Band of the Minnesota Chippewa Tribe. The White Earth Band has an 880,000-acre Reservation in northwest Minnesota. Of the approximately 22,000 members of the White Earth Band, approximately 3,800, including petitioners, live on the Reservation. Clark Pet. App. A56.

During the period 1990 to 1994, petitioners served on the five-member Reservation Tribal Council (RTC), the White Earth Band's elected governing body. Wadena was chairman of the RTC, Rawley was treasurer, and Clark was a councilman. As members of the RTC, petitioners controlled, among other things, the disbursement of tribal funds. Clark Pet. App. A56 & n.2.

The government's prosecution of petitioners involved three distinct, but related, conspiracies carried out in the early 1990s:

The Construction Conspiracy. In 1991, the RTC authorized the use of approximately $5 million from the White Earth Economic Development and Tribal Government Fund for the construction of the Shooting Star Casino on the Reservation.[1] The RTC appointed Clark to oversee the construction of the casino and hired Gordon Construction, Inc., to act as general contractor. Gordon Construction subcontracted for drywall installation with Northern Drywall and Construction, Inc., a company that Clark himself owned and managed, even though the company had not submitted a formal bid and had never undertaken a project of similar scale. Clark Pet. App. A57.

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[1] The Fund was established pursuant to the White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, 100 Stat. 61, "for economic development for the benefit of the White Earth Band of Chippewa Indians." The approximately $6.6 million appropriated to the Fund was then held in trust by the United States for the White Earth Band. Clark Pet. App. A57, A115.

From 1991 through 1993, while the casino was being built and afterward, Northern Drywall made payments totaling more than $428,000 to Wadena. In response to an inquiry by the Internal Revenue Service, Clark and Wadena claimed that Wadena had an ownership interest in Northern Drywall and that the payments represented Wadena's share of the company's profits. But Wadena had never mentioned that alleged ownership interest in financial statements or loan applications that he filed before the IRS inquiry. Northern Drywall's own accountant was unaware that Wadena had any interest in the company. After the payments were discovered, Clark falsified and backdated corporate minutes and stock certificates in an attempt to document Wadena's interest. Clark Pet. App. A58.

In 1992, Northern Drywall made a $15,000 payment to Rawley as well. Clark and Rawley told the IRS that the payment was for consulting services, and Clark falsified Northern Drywall's corporate minutes to support that claim. In fact, Northern Drywall made the payment to secure Rawley's silence about its more substantial payments to Wadena, who was Rawley's political rival within the White Earth Band. Clark Pet. App. A58; Gov't C.A. Br. 6.

The Commissions Conspiracy. In their capacities as members of the RTC, petitioners created two commissions—the Gaming Control Commission and the Fishing Commission—of which petitioners were the sole members. The commissions served essentially no function. Petitioners did not assume any new duties as a result of their membership on the commissions. Clark Pet. App. A59.

Both commissions were little more than shells to provide cover for petitioners' payments to themselves of tens of thousands of dollars from the White Earth Band treasury. Those payments were in addition to petitioners' generous salaries for their membership on the RTC. During the period 1990 through 1993, petitioners extracted more than $1.2 million from the White Earth Band treasury on account

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of their membership on the RTC and the commissions. Clark Pet. App. A59-A60 & n.6.

The Election Conspiracy. In 1994, Clark and Rawley sought re-election to the RTC. Absentee ballots were key to victory in the election, because most White Earth Band members lived outside the Reservation, yet were eligible to vote for tribal officers. According to the procedure prescribed by the Minnesota Chippewa Tribe, absentee voters had to sign an affidavit before a notary swearing to several facts, including their own identity. The absentee ballot had to be mailed directly to the election headquarters. Clark Pet. App. A61.

During the 1994 election, Clark and Rawley participated in falsely notarizing a large number of absentee ballots, and Clark himself forged many of the ballots. Some of those recorded as casting absentee ballots in the 1994 election were already dead at that time. Clark and Rawley used the United States mails and notaries licensed by the State of Minnesota to perpetrate the fraud. Clark Pet. App. A61; Gov't C.A. Br. 7-8.

2. In August 1995, a grand jury returned a 44-count indictment charging petitioners with conspiracy, money laundering, mail fraud, willful misapplication of tribal funds, theft or bribery concerning programs receiving federal funds, and conspiracy to commit election fraud. Clark Pet. App. A55; Gov't C.A. Br. 1.[2]

Petitioners moved to dismiss the indictment for lack of jurisdiction. They argued that federal criminal laws of general applicability, such as the ones under which they were

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[2] The indictment also charged two notaries, Peter Pequette, Jr., and Henry Harper, and the White Earth Band's chief election judge, Carley Jasken, in connection with the election conspiracy. Pequette agreed to cooperate and pleaded guilty in state court to the unauthorized use of his notary stamp. Harper pleaded guilty to making a false writing, in violation of 18 U.S.C. 1001 (1994). Jasken was acquitted on all counts. Clark Pet. App. A61-A62 n.8; Gov't C.A. Br. 1 n.2

charged, cannot be used to prosecute a crime committed by one Indian against another Indian in Indian country. The district court denied the motion. Clark Pet. App. A13-A23.

The case went to trial in May 1996. During the six-week trial, the jury heard testimony from approximately 150 witnesses and received nearly 900 exhibits. Gov't C.A. Br. 2.

At the end of the trial, the district court instructed the jury on the elements of each offense charged. After enumerating the elements of 18 U.S.C. 1163, which makes it unlawful to "willfully misappl[y]" the funds of an "Indian tribal organization," the court instructed the jury that "[t]he White Earth Band of the Minnesota Chippewa Tribe is an Indian tribal organization" for purposes of 18 U.S.C. 1163. And, in instructing the jury with regard to 18 U.S.C. 666(a)(1)(B), which makes it unlawful for an agent of an "Indian tribal government" to "corruptly * * * accept[] * * * anything of value * * * intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such * * * government," the court substituted "White Earth Band" for "Indian tribal government." Clark and Wadena objected to those instructions on the ground that it was for the jury to decide whether the White Earth Band is an "Indian tribal organization" or an "Indian tribal government." The court overruled the objections. Clark Pet. App. A96-A97; Wadena Pet. 7; Wadena Pet. App. A107-A109, A111.

The jury found petitioners guilty on virtually all of the counts charged. Clark and Rawley were each acquitted on one count of misapplying tribal funds. Clark Pet. App. A60, A62.

3. The court of appeals affirmed. Clark Pet. App. A54-A107.

First, the court of appeals rejected petitioners' contention that the federal criminal laws under which they were charged—all of which apply generally throughout the United States—do not apply in Indian country if the perpetrator

and the victim are Indians. Clark Pet. App. A62-A69. Petitioners based their argument on two statutes dating from the 19th Century: the Indian Country Crimes Act, 18 U.S.C. 1152, and the Indian Major Crimes Act, 18 U.S.C. 1153. Section 1152 provides that "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States * * * shall extend to the Indian country"; the statute further states, however, that "[t]his section shall not extend to offenses committed by one Indian against the person or property of another Indian." Section 1153, in turn, provides that "[a]ny Indian who commits against the person or property of anther Indian or other person any of the following offenses"—which include murder, burglary, and rape, among others—"within the Indian country, shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States."

The court of appeals recognized that Section 1152 and Section 1153 are concerned only with a particular category of crimes: those crimes that the United States has jurisdiction to prosecute solely because they occur in Indian country, or in "any place within the sole and exclusive jurisdiction of the United States," as opposed to a place in which a State would have jurisdiction to prosecute. Clark Pet. App. A66-A68. The court explained that "[f]ederal statutes of general applicability, those in which situs of the offense is not an element of the crime, are not encompassed within [Section 1152]." *Id.* at A66. Accordingly, said the court, "the Indian-against-Indian exception contained in [Section 1152] does not apply to federal criminal laws of general applicability." *Id.* at A66-A67.

Second, the court of appeals rejected petitioners' argument that 18 U.S.C. 241, which broadly prohibits conspiracies to deprive a person of "any right or privilege secured to him by the Constitution or laws of the United States,"

cannot apply to a conspiracy to stuff the ballot box in a tribal election. Clark Pet. App. A70-A79. The court held that the election conspiracy in this case deprived tribal members of a right under a law of the United States—specifically, the Indian Civil Rights Act of 1968, 25 U.S.C. 1302(8), which secures to a tribal member "the equal protection of [the] laws" of his tribe. Clark Pet. App. A74-A75.

The court of appeals observed that "this circuit, as well as several others," has held that the Equal Protection Clause of the Fourteenth Amendment protects against fraud in state and local elections. Clark Pet. App. A73 (citing cases). The court then concluded that "this protection against voter fraud has been carried over into the [Indian Civil Rights Act], as it applies to the facts of this case." *Id.* at A75. The court noted that among those facts was the Minnesota Chippewa Tribe's own adoption of the "one-man-one-vote principle" in tribal elections, as reflected in the provision of the tribal Constitution stating that "[a]ll members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe." *Id.* at A74-A75.

The court of appeals concluded that *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), which held that no implied private right of action exists under the Indian Civil Rights Act in federal court, does not preclude the prosecution under Section 241 of conspiracies to interfere with the exercise of rights secured by that Act. The court explained that "[n]othing in *Santa Clara* addresses the U.S. government's right or obligation to assume *criminal* jurisdiction when one of its laws of general[] applicability is violated." Clark Pet. App. A76. The court observed that a Section 241 prosecution against tribal officials in their individual capacities for conspiracy to violate rights secured by the Indian Civil Rights Act does not present the sort of threat to tribal sovereignty that *Santa Clara Pueblo* perceived to be presented

by a private civil action against tribal officials in their official capacities to challenge tribal policies and practices. The court explained that "[t]he Band's right to self-determination * * * is not being threatened by ensuring that voters are not defrauded"; to the contrary, "the Band's right to free and open elections is vindicated by the present criminal action." *Ibid.* The court also noted that the assumption in *Santa Clara Pueblo* that tribal courts would be available to vindicate rights secured by the Indian Civil Rights Act was inapplicable in cases such as this one: "[W]hen the entire tribal system allegedly is controlled by a few corrupt individuals," said the court, "there is no effective tribal forum available to protect an individual tribal member's civil rights." *Id.* at A77.

Finally, the court of appeals rejected petitioners' challenges to the jury instructions on the counts charging misapplication of funds of an "Indian tribal organization," in violation of 18 U.S.C. 1163, and offering of a bribe to, or acceptance of a bribe by, an agent of an "Indian tribal government," in violation of 18 U.S.C. 666. Clark Pet. App. A96-A97. The court declined to decide whether the district court erred in informing the jury that the White Earth Band is an "Indian tribal organization" for purposes of Section 1163, and in substituting "the White Earth Band" for an "Indian tribal government" in its instruction on Section 666. The court held that any claimed error was harmless because petitioners themselves had affirmatively argued "that the federal courts lack jurisdiction over this entire case because of the Band's status as an independent sovereign and their statuses as members of the Band." Clark Pet. App. A97.

Judge Beam dissented from the portion of the panel's opinion upholding petitioners' prosecution for election fraud under 18 U.S.C. 241. Clark Pet. App. A102-A106. He argued that an Indian tribe's "exclusive right to prosecute tribal election offenses" is "necessary to maintain political integrity." *Id.* at A105. He acknowledged that "Congress

could remove this aspect of sovereignty and interject federal election policies and remedies into tribal elections." *Ibid.* However, in the absence of any "express congressional authority" to prosecute tribal election fraud, he concluded that the federal government could not do so under Section 241. *Id.* at A105-A106.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other circuit. This Court's review is therefore not warranted.

1. a. Petitioners challenge the court of appeals' holding that federal criminal laws of general applicability—including all of the laws under which petitioners were prosecuted in this case—ordinarily apply in Indian country even when the perpetrator and the victim are Indians. See Wadena Pet. 16-30; Clark Pet. 24-25. Petitioner Wadena contends that the court of appeals' decision conflicts in that regard with decisions of this Court that, in his view, "find[] that federal jurisdiction does not arise in intra-Indian disputes except by explicit provision of Congress." Wadena Pet. 20.

The modern decisions of this Court on which petitioner Wadena relies (see Wadena Pet. 20-21) do not involve any question of federal criminal jurisdiction in Indian country.[3] Nor do they contain even isolated dicta stating that Congress, when enacting a statute applicable generally throughout the United States, must expressly provide that the statute is to apply to Indians in Indian country. The Court has elsewhere recognized a contrary rule: that "gen-

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[3] See *Duro* v. *Reina*, 495 U.S. 676 (1990) (holding that tribes cannot exercise criminal jurisdiction over Indians who are not tribal members); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978) (holding that the Indian Civil Rights Act does not impliedly authorize private civil actions in federal court against tribes or their officials); *Williams* v. *Lee*, 358 U.S. 217 (1959) (holding that state courts lack jurisdiction over civil cases by non-Indians against Indians arising out of events in Indian country).

eral Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

Petitioner Wadena also relies (Wadena Pet. 18, 21) on an older decision, *United States* v. *Quiver*, 241 U.S. 602 (1916), that does inyolve a federal prosecution of an Indian in Indian country. The Court was concerned in *Quiver* with whether the federal adultery statute could be used to prosecute adultery by an Indian couple on a reservation. The Court perceived the issue to be governed by two statutes: the Indian Country Crimes Act, now codified at 18 U.S.C. 1152, and the Indian Major Crimes Act, now codified at 18 U.S.C. 1153. The Indian Country Crimes Act, while extending to Indian country "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States," excludes "offenses committed by one Indian against the person or property of another Indian." 18 U.S.C. 1152. The Indian Major Crimes Act, however, provides for exclusive federal jurisdiction over certain offenses committed by an Indian against another Indian in Indian country. 18 U.S.C. 1153. The Court concluded that the federal government had no authority to bring the prosecution in *Quiver* because adultery was not among the offenses enumerated in the Indian Major Crimes Act, reasoning that "the enumeration in [that Act] of certain offenses as applicable to Indians in the reservations carries with it some implication of a purpose to exclude others." 241 U.S. at 606.

Quiver was decided at a time before tribal Indians had been made citizens of the United States. See Act of June 2, 1924, ch. 233, 43 Stat. 253 (declaring all U.S.-born Indians to be citizens). The common understanding at that time was that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Tuscarora Indian Nation*, 362 U.S. at 116

(quoting *Elk* v. *Wilkins*, 112 U.S. 94, 100 (1884)). It was in the context of that time that the Court assumed in *Quiver* that Congress intended Indians to be subject to prosecution only under those laws that had expressly been made applicable to them, such as those enumerated in the Indian Major Crimes Act. But "[h]owever that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians." *Ibid.*

This Court has recognized since *Quiver* that federal criminal jurisdiction over Indians in Indian country is not confined to the offenses specified in the Indian Major Crimes Act (or to other offenses expressly made applicable to Indians). In *United States* v. *Wheeler*, 435 U.S. 313 (1978), the Court explained that federal jurisdiction over crimes committed by Indians extends not only to the crimes enumerated in the Indian Major Crimes Act, but also "to crimes over which there is federal jurisdiction regardless of whether an Indian is involved." *Id.* at 330 n.30. The Court offered as an example the generally applicable offense of assault on a federal officer. *Ibid.*; see also R.N. Clinton et al., *American Indian Law* 294 (3d ed. 1991) ("If the crime is a federal crime of nationwide application, federal jurisdiction exists irrespective of the locus of the crime or the status of the parties unless the prosecution for the crime would interfere with Indian treaty or other rights.") (emphasis omitted).[4]

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[4] Congress has also recognized that federal jurisdiction over Indian-against-Indian offenses in Indian country is not limited to the offenses enumerated in the Indian Major Crimes Act. A phrase omitted from petitioner Wadena's quotation (Wadena Pet. 22) from the House Report on the Indian Crimes Act of 1976 makes that point clear. After stating that jurisdiction over Indian-against-Indian offenses other than those listed in the Indian Major Crimes Act "rests with the tribe," the House Report expressly acknowledges the exception to that rule "for crimes that are peculiarly Federal." H.R. Rep. No. 1038, 94th Cong., 2d Sess. 3 (1976).

b. Petitioners assert that a conflict exists between the Second, Fourth, and Seventh Circuits, on the one hand, and the Sixth, Eighth, Ninth, and Tenth Circuits, on the other, over the applicability of general federal criminal laws to Indian-against-Indian offenses in Indian country. See Wadena Pet. 23-30; Clark Pet. 24-25. Petitioners are incorrect. The courts of appeals are in substantial agreement on that issue.

The only Fourth Circuit decision on which petitioners rely, *United States* v. *Welch*, 822 F.2d 460 (1987), is wholly inapposite. To be sure, the court stated in that case that "[w]hen there is a crime by an Indian against another Indian within Indian country only those offenses enumerated in the Major Crimes Act may be tried in the federal courts." *Id.* at 464. But the court had no occasion in *Welch* to consider the applicability in Indian country of general federal criminal laws. The only crimes charged in that case were rape and a state-law sexual offense. The court reversed the rape conviction because the defendant was not tried under the federal statute that defined the offense of rape within the exclusive jurisdiction of the United States. *Id.* at 464-465. The court reversed the sexual-offense conviction because the defendant's conduct, although a violation of state law, was not one of the crimes enumerated in the Indian Major Crimes Act. *Ibid.*

All of the courts of appeals to address the issue squarely agree that general federal criminal laws ordinarily do apply to Indian-against-Indian offenses in Indian country. In the most recent of the assertedly conflicting decisions cited by petitioners, for example, the Seventh Circuit recognized that "[a]s a general rule, statutes written in terms applying to all persons include members of Indian tribes as well." *United States* v. *Funmaker*, 10 F.3d 1327, 1330 (1993). The court suggested that an exception should be made to that rule only "when the application of a statute would affect Indian or tribal rights recognized by treaty or statute, or would affect

rights essential to self-governance of intramural matters." *Ibid.* It is only then, said the court, that a statute "specifically must evince Congressional intent to interfere with those rights." *Id.* at 1330-1331. The court went on to conclude that 18 U.S.C. 844(i) (1994), which prohibits damaging or destroying property used in or affecting interstate commerce, and 18 U.S.C. 924(c) (1994), which prohibits the use of a destructive device in connection with a crime of violence, do not affect rights essential to tribal self-governance and, consequently, do not require an express statement of congressional intent that they apply to Indians in Indian country. The court reached that conclusion even though those laws were being used in *Funmaker* to prosecute an Indian who destroyed a reservation bingo hall at the express direction of tribal officials. The court explained that "[t]he decision-making power of Indian tribes ends * * * at the point when those decisions would violate federal law designed to safeguard important federal interests such as the free flow of interstate commerce." 10 F.3d at 1332.

In the only assertedly conflicting case cited by petitioners from the Second Circuit, *United States* v. *Markiewicz*, 978 F.2d 786 (1992), cert. denied, 506 U.S. 1086 (1993), the court found it unnecessary to decide whether "all federal criminal laws appl[y] to Indians who commit crimes against other Indians on Indian territory." *Id.* at 800. The court concluded that federal jurisdiction over all of the crimes charged in that case could be sustained on narrower grounds. *Ibid.*[5] It is thus erroneous for petitioners to assert that the Second Circuit has adopted any definitive position on the question.

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[5] The court concluded, for example, that federal jurisdiction exists over violations of 18 U.S.C. 1163, which prohibits the theft of funds of a tribal organization, because the text and legislative history of the statute indicate that "[C]ongress sought to create federal-court jurisdiction over this particular kind of Indian-against-Indian crime." 978 F.2d at 800. Section 1163 is one of the statutes under which petitioners were prosecuted in this case.

The court indicated in dicta, moreover, that federal jurisdiction should extend at least to prosecutions under all federal criminal laws that "protect an independent federal interest." *Ibid.* Such a standard could be expected to permit the application of most general federal criminal laws to Indians in Indian country in most circumstances. As the court of appeals observed in this case, "[i]f Congress passes any federal act, assuming it has constitutional authority to do so, there always exists a federal concern and interest." Clark Pet. App. A67.

In sum, whatever differences may arguably exist in the standards articulated by the circuits, those standards have not led, and are unlikely to lead, to different results on similar facts. Indeed, the Second and Seventh Circuits held that federal criminal jurisdiction was proper in all of the assertedly conflicting cases on which petitioners rely. See *Funmaker*, 10 F.3d at 1331-1332; *Markiewicz*, 978 F.2d at 800-802; *United States* v. *Smith*, 562 F.2d 453, 458 (7th Cir. 1977), cert. denied, 434 U.S. 1072 (1978).[6]

2. Petitioners Clark and Rawley challenge their convictions under 18 U.S.C. 241, claiming that the statute does not apply to a conspiracy to stuff the ballot box in a tribal election. See Clark Pet. 6-23; Rawley Pet. 7-12. Petitioners' claim lacks merit. Nor does that claim present any issue of general significance, given the infrequency with which the United States prosecutes election fraud or any other conduct of tribal officials under Section 241. The claim is of little practical consequence even in this case, given petitioners' concurrent sentences on multiple other counts.[7]

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[6] Petitioner Wadena also claims (Wadena Pet. 27-28) that there is conflict within the Eighth and Ninth Circuits on this issue. That claim, even if it were accurate, does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[7] Petitioners were sentenced to concurrent terms of imprisonment on each of the counts on which they were convicted—21 of which in the case of petitioner Clark and 16 of which in the case of petitioner Rawley were

a. As relevant here, Section 241 makes it unlawful for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. 241 (Supp. II. 1996). In this case, petitioners were charged with conspiracy to injure and oppress the rights of White Earth Band members under the equal protection clause of the Indian Civil Rights Act of 1968, 25 U.S.C. 1302(8), "to have their votes in the [tribal] election cast and tabulated fairly and free from dilution by ballots illegally and improperly cast and tabulated." Clark Pet. App. A139 (Indictment ¶ 106(b)).

That charge falls within the textual scope of Section 241. The Indian Civil Rights Act is a "law[] of the United States" that confers "right[s]" and "privilege[s]" on persons in the United States. The Act secures to Indians various rights as against their tribal governments that are analogous, in many respects, to the rights that the United States Constitution secures to citizens as against their federal and state governments. The Act thus prohibits a tribe from, among other things, "deny[ing] to any person within its jurisdiction the equal protection of its laws." 25 U.S.C. 1302(8). The White Earth Band's own organic law—the Constitution of the Minnesota Chippewa Tribe—also guarantees tribal members' equal protection rights. Minnesota Chippewa Tribe Const. Art. XIII ("All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe.") (Clark Pet. App. A74). A conspiracy to deprive a tribal member of his right under the Indian Civil Rights Act to the equal protection of his tribe's laws is thus, within the terms of Section

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not based on Section 241. See Clark Pet. 2; Clark Pet. App. A43-A51; Rawley Judgment 1-3.

241, a conspiracy "to injure [or] oppress * * * [a] person * * * in the free exercise or enjoyment of [a] right or privilege secured to him by the * * * laws of the United States."[8]

The question remains whether a tribal member's right to equal protection of his tribe's laws includes the right not to have his vote in a tribal election diluted by fraud. This Court has recognized that vote-dilution schemes, including stuffing the ballot box, violate citizens' constitutional right to vote in federal elections. See *Reynolds* v. *Sims*, 377 U.S. 533, 554-556 (1964) (citing cases).[9] The Court has not decided

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[8] Petitioner Clark argues (Clark Pet. 14) that "[s]imply because a right exists under federal law does not mean that it may serve as the basis for a prosecution under [Section 241]." This Court has recognized, however, that Section 241's reference to "any right or privilege secured * * * by the Constitution or laws of the United States" must be construed broadly. See, *e.g.*, *United States* v. *Price*, 383 U.S. 787, 800 (1966) ("The language of § 241 is plain and unlimited. * * * [I]ts language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States."); *United States* v. *Guest*, 383 U.S. 745, 753 (1966) ("when § 241 speaks of 'any right or privilege secured . . . by the Constitution or laws of the United States,' it means precisely that"). The Court has suggested that Section 241 is inapplicable only to rights enforceable by a separate exclusive statutory scheme. See *United States* v. *Johnson*, 390 U.S. 563, 567 (1968). *Price* and *Guest* also refute petitioner Clark's more specific claim (Clark Pet. 14) that "§ 241 does not extend to conspiracies to violate rights secured by * * * the Fourteenth Amendment." See *Price*, 383 U.S. at 801 (Due Process Clause of the Fourteenth Amendment); *Guest*, 383 U.S. at 753-754 (Equal Protection Clause).

[9] The cases cited by the Court in *Reynolds* upheld prosecutions under Section 19 of the Criminal Code, the predecessor to Section 241, involving vote fraud conspiracies in federal elections. See *United States* v. *Saylor*, 322 U.S. 385 (1944) (scheme to stuff ballot box with forged ballots); *United States* v. *Classic*, 313 U.S. 299 (1941) (scheme to alter ballots and to certify falsely number of votes); *United States* v. *Mosley*, 238 U.S. 383 (1915) (scheme not to count legitimate votes cast). Petitioners note (Clark Pet. 13) that *United States* v. *Bathgate*, 246 U.S. 220 (1918), held that a conspiracy to bribe voters was not covered by Section 19. But *Bathgate* rested on the fact that Congress had repealed a section of the law, of which Section 19 was a part, that specifically prohibited bribing voters.

whether similar vote-dilution schemes involving state or local elections violate citizens' rights under the Equal Protection Clause of the Fourteenth Amendment. See *Anderson* v. *United States*, 417 U.S. 211, 228 (1974) (declining to reach the question). Two circuits have held, however, that vote-dilution schemes involving only a state or local election do violate voters' rights under the Equal Protection Clause, and thus may be prosecuted under Section 241. See *United States* v. *Olinger*, 759 F.2d 1293, 1302-1304 (7th Cir.), cert. denied, 474 U.S. 839 (1985); *United States* v. *Stollings*, 501 F.2d 954, 955 (4th Cir. 1974); *United States* v. *Anderson*, 481 F.2d 685, 698-700 (4th Cir. 1973), aff'd on other grounds, 417 U.S. 211 (1974). No circuit has reached a contrary conclusion.

The Seventh Circuit explained in *Olinger* that, "[w]hile it may be that the Constitution provides the right to vote only in federal elections and that the right to vote in purely state elections must derive from state constitutions or laws, * * * where states provide for the election of officers, that right * * * is protected against dilution involving 'state action' under the Equal Protection Clause of the Fourteenth Amendment." 759 F.2d at 1303; accord *Anderson*, 481 F.2d at 699. A similar rationale applies to vote dilution in tribal elections. The United States Constitution does not, to be sure, provide a right to vote in tribal elections. And a tribe may permissibly select its leaders through means other than election. Or the tribe may choose to conduct its elections on a basis other than "one person, one vote." See 25 U.S.C. 3601(4) (congressional finding that "Indian tribes possess the inherent authority to establish their own form of government"). Where, however, a tribe has chosen to elect its

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Id. at 225-226. In *Saylor*, a case that, like this one, involved the forging of ballots, the Court distinguished *Bathgate* and held that, consistent with its earlier decision in *Mosley*, a conspiracy to stuff a ballot box with false ballots could be prosecuted under Section 19. *Saylor*, 322 U.S. at 388-390.

leaders on a "one person, one vote" basis, as the White Earth Band indisputably has (see Clark Pet. App. A74-A75), a tribal member is protected against vote-dilution schemes by the equal protection clause of the Indian Civil Rights Act. See *White Eagle* v. *One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973) (per curiam) (where "[t]he tribe itself * * * has established voting procedures precisely paralleling those commonly found in [Anglo-American] culture," the equal protection clause of the Indian Civil Rights Act requires "a fair compliance with the tribe's own voting procedures in accordance with the principles of" one person, one vote); accord *Howlett* v. *Salish & Kootenai Tribes*, 529 F.2d 233, 237-239 (9th Cir. 1976); cf. *United States* v. *Doherty*, 126 F.3d 769, 780 (6th Cir. 1997) (courts in applying the Indian Civil Rights Act must consider whether a particular tribe's concepts of equal protection and due process accord with "the Anglo-American system") (internal quotation marks omitted), cert. denied, 118 S. Ct. 2299 (1998). The perpetrators of such vote-dilution schemes may be prosecuted by the United States under Section 241.[10]

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[10] As noted in the text, the Fourth and Seventh Circuits have required that, in order to violate rights secured by the Equal Protection Clause, a scheme to stuff the ballot box in a state or local election must involve some action "under color" of state law. But that requirement is not particularly rigorous:

> It is * * * not necessary that the "involvement of the State need be either exclusive or direct"; it may be merely "peripheral." Nor is it essential that the state official be a party defendant; it is sufficient if the proof involves "a charge of active connivance by agents of the State" in the wrongful acts done in furtherance of the conspiracy.

Olinger, 759 F.2d at 1303-1304 (quoting *Guest*, 383 U.S. at 755).

The election conspiracy in this case was clearly carried out "under color" of tribal law. Not only were petitioners Clark and Rawley officials of the White Earth Band. But the indictment alleged that they used their official positions to "cause[] to be paid, from the White Earth Band of Chippewa Indians General Fund, money, disguised as assistance payments, to various individuals to obtain [absentee ballot] request cards and

Petitioner Rawley complains (Rawley Pet. 8, 11-12) that he did not have fair warning that Section 241 applied to his conduct. This Court has, however, "upheld convictions under § 241 * * * despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *United States* v. *Lanier*, 520 U.S. 259, 269 (1997). Those prior decisions need not be ones of this Court. *Id.* at 268-269; see also *Screws* v. *United States*, 325 U.S. 91, 104 (1945) (plurality opinion). The decisions of this Court gave petitioners the requisite "reasonable warning" that schemes to stuff the ballot box in a federal election generally violate constitutional rights. The decisions of two courts of appeals gave petitioners reasonable warning that schemes to stuff the ballot box in a state or local election specifically violate the Equal Protection Clause of the Fourteenth Amendment. The decisions of the Eighth Circuit gave petitioners reasonable warning that, in a tribe that "has established voting procedures precisely paralleling those commonly found in [Anglo-American] culture," *White Eagle*, 478 F.2d at 1314, conduct that would violate the Equal Protection Clause of the Fourteenth Amendment in a state or local election violates the equal protection clause of the Indian Civil Rights Act in a tribal election. See *Means* v. *Wilson*, 522 F.2d 833, 841 (8th Cir. 1975) (recognizing that a conspiracy involving tribal officials to ensure the reelection of the tribal council president may violate the equal protection

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absentee ballots" in order to carry out the election conspiracy. Clark Pet. App. A141 (Indictment ¶¶ 116, 117). The indictment further alleged that petitioners conspired with a tribal election judge, among others, in order to commit the election fraud. *Id.* at A140-A142 (Indictment ¶¶ 110, 113, 114, 118, 124). Petitioners also were alleged to have conspired with notaries licensed by the State of Minnesota, two of whom were indicted in this case, who illegally notarized the fraudulently cast ballots. *Id.* at A16; A141-A142 (Indictment ¶¶ 120-123).

clause of the Indian Civil Rights Act), cert. denied, 424 U.S. 958 (1976).[11] And the Constitution of the Minnesota Chippewa Tribe and the election laws and procedures of the White Earth Band, which reflect concepts of equal protection "precisely paralleling those commonly found in [Anglo-American] culture," *White Eagle*, 478 F.2d at 1314, gave petitioners reasonable warning that equal protection constraints on vote-dilution schemes would apply to the tribal election here.

b. Petitioners essentially request an exception to Section 241's "plain and unlimited" language, *United States* v. *Price*, 383 U.S. 787, 800 (1966), on the ground that prosecution of tribal election fraud invades tribal sovereignty in a manner contrary to the spirit of the Indian Civil Rights Act. Clark Pet. 15-23; Rawley Pet. 8-9. No support for petitioners' position can be found in the text of Section 241. The text of the Indian Civil Rights Act likewise does not reflect any congressional intent to exclude conspiracies to deprive individuals of the rights secured by that Act from the reach of Section 241.

Nor does the legislative history of the Indian Civil Rights Act demonstrate, as petitioner Clark contends (Clark Pet. 17-18), that Congress intended to deprive the United States of the authority to prosecute violations of the Act. It is true that S. 963, 98th Cong., 1st Sess. (1965), one of several bills considered by the Senate Judiciary Committee during the hearings that ultimately produced the Indian Civil Rights Act, would have authorized the Attorney General "to receive and investigate" complaints filed by or on behalf of an Indian alleging a violation of any civil right and to "bring such

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[11] The Eighth Circuit's decisions in *White Eagle* and *Means*, to the extent that they hold or assume that a private right of action exists under the Indian Civil Rights Act, were overruled by *Santa Clara Pueblo*, 436 U.S. at 59-72. But the Eighth Circuit's analysis in those cases of the substantive scope of the equal protection clause of the Indian Civil Rights Act was not undermined by *Santa Clara Pueblo*.

criminal or other action as he deems appropriate to vindicate and secure such right to such Indian." *Constitutional Rights of the American Indian: Hearings on S. 961, etc., Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 7 (1965) (*Senate Hearings*); see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 67-68 (1978) (discussing S. 963). The Judiciary Committee offered no explanation why S. 963 was not incorporated into the version of the Act that was reported to the full Senate. The statements of the witnesses at the Judiciary Committee hearings do not establish the reason. As Justice White noted in his dissenting opinion in *Santa Clara Pueblo*, "[w]hile two witnesses did express their fears that the proposal would disrupt tribal governments, many others expressed the view that the proposals gave the Attorney General no more authority than he already possessed." 436 U.S. at 78. The Solicitor of the Department of the Interior, the principal witness for the United States at the hearings, was among those taking that position. *Ibid.*; see *Senate Hearings* at 20, 319 (statements of both the Solicitor and the Acting Secretary of the Department of the Interior describing the bill as "unnecessary").[12] The omission of S. 963 from the Indian Civil Rights Act thus cannot properly be viewed as an expression of Congress's intent to bar prosecutions under Section 241 for violations of rights secured by that Act.

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[12] It may well be that S. 963 was considered unnecessary by the government representatives, and unobjectionable by most tribal representatives, because they did not perceive S. 963 as directed at the enforcement of Indians' newly secured rights against tribal officials. They instead perceived S. 963 as directed primarily at the enforcement of Indians' existing constitutional and civil rights against federal, state, and local officials and private businesses. See *Santa Clara Pueblo*, 436 U.S. at 77 (noting that "the focus of S. 963 was in large part aimed at nontribal deprivations of Indian rights"); see also *Senate Hearings* at 67, 71, 75, 80, 86, 132, 143-144, 153, 194, 206 (endorsements of S. 963 by representatives of the Association on American Indian Affairs, the National Congress of American Indians, and numerous Indian tribes).

None of the decisions on which petitioners rely in this regard (see Clark Pet. 18-22; Rawley Pet.9-10) holds, or even suggests, that Section 241 does not reach conspiracies to violate rights secured by the Indian Civil Rights Act, including the right not to have one's vote in a tribal election diluted by fraud. Those cases are principally concerned with whether any private right of action exists, under the Indian Civil Rights Act or under any other federal statute, that would enable an individual to bring a civil action in federal district court to enforce rights secured by the Act. See *Santa Clara Pueblo*, 436 U.S. at 58-72; *Nero* v. *Cherokee Nation*, 892 F.2d 1457, 1461-1463 (10th Cir. 1989); *Wheeler* v. *Swimmer*, 835 F.2d 259, 261-262 (10th Cir. 1987); *Runs After* v. *United States*, 766 F.2d 347, 353-354 (8th Cir. 1985); *Groundhog* v. *Keeler*, 442 F.2d 674, 681-683 (10th Cir. 1971). The question presented in this case is, of course, unlike the question presented in *Santa Clara Pueblo*. The question there was whether to read into the Indian Civil Rights Act a private right of action to enforce its provisions that Congress did not expressly place there. The question here is not whether similarly to read into the Indian Civil Rights Act an implied right on the part of the United States to prosecute violations of its provisions. It is instead whether to read into that Act an *exception*, which Congress did not expressly place there, to the authority that the United States would otherwise possess under Section 241 to prosecute conspiracies to violate "any right or privilege secured * * * by the * * * laws of the United States."[13]

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[13] Petitioner Rawley argues (Rawley Pet. 10-11) that the *Santa Clara Pueblo* and *Runs After* decisions indicate that federal courts do not have jurisdiction to interpret the rights secured by the Indian Civil Rights Act. He is wrong. Those cases, which involved disputes arising in the civil context, foreclose only a particular remedy, a private right of action. By making a writ of habeas corpus available to "any person * * * to test the legality of his detention by order of an Indian tribe," 25 U.S.C. 1303,

The premise of petitioners' argument—that tribal sovereignty is invaded by a Section 241 prosecution such as this one—is also incorrect. As the court of appeals recognized, there is a significant difference between, on the one hand, the federal government's interfering with official actions of a tribal government and internecine disputes over them, see, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 51 (challenge to "the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members"), and, on the other, the federal government's prosecuting the naked corruption by individual tribal officials of a tribe's own chosen election procedures. As the court of appeals recognized, "[t]he [White Earth] Band's right to self-determination * * * is not being threatened by ensuring that voters are not defrauded"; rather, "the Band's right to free and open elections is vindicated by the present criminal action." Clark Pet. App. A76.

c. Finally, as petitioner Clark acknowledges, this is the only case in which the United States has prosecuted tribal election fraud under Section 241. See Clark Pet. 15 (noting "the absence of any similar § 241 prosecution for violations of the [Indian Civil Rights Act] in the 30 years since its enactment"). No other such prosecution is contemplated at this time. The United States has no interest in generally policing, through Section 241 or otherwise, the elections and other internal activities of Indian tribes.[14] To the contrary,

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Congress plainly contemplated a role for the federal courts in interpreting the Indian Civil Rights Act.

[14] Nor does Section 241 provide a means for the United States to do so. As noted in the text, in order to establish a violation of Section 241, the United States must prove that the defendants conspired to violate a "right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Lanier*, 520 U.S. at 267 (quoting *Screws*, 325 U.S. at 104). And the United States must do so beyond a reasonable doubt. It is thus only in rare cases, such as this one, involving clear, substantial, and egregious violations of

the United States has repeatedly reaffirmed "the right of Indian tribes to self-government," including the right to "exercise inherent sovereign powers over their members and territory," and has dealt with Indian tribes "on a government-to-government basis" to address issues of mutual concern. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998); see also 25 U.S.C. 3601(3) and (4) (acknowledging the "inherent sovereignty of Indian tribes," including "the inherent authority to establish their own form of government"). The United States can be expected to continue to exercise its prosecutorial authority in accordance with those principles, which counsel against prosecuting tribal members in connection with their conduct of internal tribal affairs except where overriding federal interests are at stake.[15] There is thus no reason to conclude that petitioners' challenge to the use of Section 241 to prosecute tribal election fraud is one of general significance that merits this Court's review.[16]

3. Petitioner Wadena argues that the district court committed structural error in its jury instructions in two respects: *first*, by instructing the jury that the White Earth

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individuals' rights under the Indian Civil Rights Act that the United States could expect to prevail on a Section 241 prosecution against tribal officials.

[15] A United States Attorney is required to consult with the Public Integrity Section of the Department of Justice before instituting any prosecution under Section 241 for corruption in the electoral process. United States Dep't of Justice, *United States Attorneys' Manual* 9-85.210 (1997). Those procedures were followed in this case. The Department of Justice is considering the adoption of additional internal consultative procedures with respect to prosecutions of tribal officials.

[16] Petitioner Rawley also poses the question (Rawley Pet. i) "[w]hether [his] right under the Due Process Clause of the Fifth Amendment to a fair trial was violated by being tried on non-election offenses as well as election offenses." Rawley's petition contains no argument on this question, however, and he did not contest joinder of the election offenses with the non-election offenses in the court of appeals. Clark Pet. App. A79 n.22. He has accordingly waived the issue.

Band is an "Indian tribal organization" under 18 U.S.C. 1163, which makes it unlawful to "willfully misappl[y]" the funds of an "Indian tribal organization," and, *second*, by substituting the "White Earth Band of Chippewa Indians" for "Indian tribal government" in its jury instruction on 18 U.S.C. 666, which prohibits an agent of an "Indian tribal government" from "accept[ing] or agree[ing] to accept, anything of value * * * intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such * * * government." Wadena Pet. 4-8. Those instructions were not erroneous.[17]

In instructing the jury that the White Earth Band is an "Indian tribal organization" and an "Indian tribal government," within the meaning of Section 1163 and Section 666, the district court was properly resolving questions that turned entirely on legislative facts. Legislative facts are those that "have relevance to legal reasoning and the law-making process," as opposed to adjudicative facts that are "simply the facts of the particular case." Fed. R. Evid. 201 advisory committee's note. A legislative fact, "[u]nlike an adjudicative fact, * * * does not change from case to case but, instead, remains fixed." *United States* v. *Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir.) (quoting *United States* v. *Bowers*, 660 F.2d 527, 531 (5th Cir. Unit B Sept. 1981) (per curiam)), cert. denied, 515 U.S. 1127 (1995); see also *United States* v. *Gould*, 536 F.2d 216, 220 (8th Cir. 1976) ("Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally,

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[17] The court of appeals did not address whether the instructions constituted error because it found the claimed error to be harmless. The court reasoned that the asserted error could not possibly have harmed petitioners because the central premise of their defense was "the Band's status as an independent sovereign and their statuses as members of the Band." Clark Pet. App. A97. Petitioner Wadena does not attempt to demonstrate that the challenged jury instructions were, in fact, prejudicial to him in any respect.

while adjudicative facts are those developed in a particular case.").

A number of circuits have recognized that a trial court may remove from the jury's consideration an element of an offense that involves only issues of uncontroverted legislative fact. See, *e.g.*, *Hernandez-Fundora*, 58 F.3d at 810-812 (whether a prison was within the "special maritime and territorial jurisdiction of the United States" for purposes of 18 U.S.C. 7); *Bowers*, 660 F.2d at 530-531 (whether a military facility was located on land that was the property of the United States for purposes of 18 U.S.C. 7); *Gould*, 536 F.2d at 220-221 (whether cocaine hydrochloride was a derivative of coca leaves and thus a schedule II controlled substance under 21 U.S.C. 812).[18]

The question whether the White Earth Band is an "Indian tribal organization" or an "Indian tribal government" likewise turns on legislative facts that "do[] not change from case to case but, instead, remain[] fixed." *Hernandez-Fundora*, 58 F.3d at 812 (quoting *Bowers*, 660 F.2d at 531). Petitioner Wadena does not identify a single fact unique to this case that bears on the question. Indeed, he concedes

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[18] Cf. *United States* v. *Wunder*, 919 F.2d 34, 36 (6th Cir. 1990) (court permissibly instructed the jury that, as a matter of law, blank IRS 1040 forms are not tax returns for purposes of a prosecution under 26 U.S.C. 7203 for failure to file a tax return); *United States* v. *Madeoy*, 912 F.2d 1486, 1494-1495 (D.C. Cir. 1990) (court permissibly instructed the jury that, as a matter of law, a VA fee appraiser is a "public official" for purposes of a prosecution under 18 U.S.C. 201(a)(1) for bribery of a public official), cert. denied, 498 U.S. 1105 (1991); *United States* v. *Nolan*, 784 F.2d 496, 498 (3d Cir.) (court permissibly instructed the jury that, as a matter of law, mail that was placed through a mail slot in the outer door of a two-family residence and remained on the floor in a common area was in an authorized mail depository for purposes of a prosecution under 18 U.S.C. 1708 for possession of items stolen from the mail), cert. denied, 476 U.S. 1144 (1986).

(Wadena Pet. 4) that the question is "uncontroversial."[19] Nor does he identify any decision holding that a district court erred in resolving itself, rather than submitting to the jury, the question whether an entity is an "Indian tribal organization," under 18 U.S.C. 1163, or an "Indian tribal government" under 18 U.S.C. 666.

None of the assertedly conflicting cases on which petitioner Wadena relies (see Wadena Pet. 8-13) involves a district court's taking from the jury a question that turned solely on legislative facts. They instead involve questions that turned on adjudicative facts that were peculiar to that case. See, *e.g.*, *United States* v. *Lopez*, 71 F.3d 954, 960-961 (1st Cir. 1995) (whether defendant's false statements to banks on loan applications were material under 18 U.S.C. 1014), cert. denied, 518 U.S. 1008 (1996); *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (whether defendant's false entries on records of thrift institution were material under 18 U.S.C. 1006). Accordingly, whether or not the courts committed error in those cases, and whether or not any such error was structural, are questions without any particular relevance to this case.

The Court already has an opportunity this Term in *Neder* v. *United States*, cert. granted, No. 97-1985 (Oct. 13, 1998), to resolve the conflict identified by petitioner Wadena as to whether a district court's failure to instruct the jury on an element of an offense is subject to harmless-error analysis. Wadena has not requested that his petition be held for disposition in light of *Neder*. There is no need for the Court to

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[19] The United States has treated the White Earth Band as a distinct tribal political entity. See, *e.g.*, White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, §§ 2, 11, 12, 17, 100 Stat. 61, 69, 70; 50 C.F.R. 32.42 (acknowledging Band's regulatory authority over hunting and fishing on its Reservation). The government offered extensive evidence at trial about the organization, governance, and laws of the Band. Petitioners offered no evidence that the Band is not a "tribal organization" or a "tribal government."

do so. As explained above, this case does not implicate the asserted conflict, because the district court resolved only questions of legislative fact, not questions of adjudicative fact as in *Neder* and the cases on which Wadena relies.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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